No. 18-266	
Title:	The Dutra Group, Petitioner v. Christopher Batterton
Docketed:	August 31, 2018
Linked with 17A1354	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(15-56775)
Decision Date:	January 23, 2018
Rehearing Denied:	May 2, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jun 07 2018	Application (17A1354) to extend the time to file a petition for a writ of certiorari from July 31, 2018 to August 30, 2018, submitted to Justice Kennedy. Main Document
Jun 07 2018	Application (17A1354) granted by Justice Kennedy extending the time to file until August 30, 2018.
Aug 30 2018	Petition for a writ of certiorari filed. (Response due October 1, 2018) Petition Appendix Certificate of Word Count Proof of Service
Sep 07 2018	Blanket Consent filed by Petitioner, The Dutra Group. Blanket Consent
Sep 21 2018	Motion to extend the time to file a response from October 1, 2018 to October 31, 2018, submitted to The Clerk. Main Document
Sep 25 2018	Blanket Consent filed by Respondent, Christopher Batterton. Blanket Consent
Sep 26 2018	Motion to extend the time to file a response is granted and the time is extended to and including October 31, 2018.
Oct 01 2018	Brief amici curiae of At-Sea Processors Association, et al. filed. Main Document Certificate of Word Count Proof of Service

Oct 01 2018	Brief amicus curiae of Maritime Law Association of the United States filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 30 2018	Brief of respondent Christopher Batterton in opposition filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 13 2018	DISTRIBUTED for Conference of 11/30/2018.
Nov 13 2018	Reply of petitioner The Dutra Group filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 03 2018	DISTRIBUTED for Conference of 12/7/2018.
Dec 07 2018	Petition GRANTED.
Dec 21 2018	Blanket Consent filed by Petitioner, The Dutra Group. **Blanket Consent**
Dec 28 2018	Motion to dispense with printing the joint appendix filed by petitioner The Dutra Group. **Main Document**
Jan 08 2019	Blanket Consent filed by Respondent, Christopher Batterton. **Blanket Consent** **Proof of Service**
Jan 14 2019	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 17 2019	Brief amicus curiae of Atlantic Sounding Co., Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 22 2019	Brief of petitioner The Dutra Group filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 22 2019	Amicus brief of Dredging Contractors of America and Council for Dredging & Marine Construction Safety not accepted for filing. (Partial submission.)
Jan 22 2019	Brief amici curiae of Dredging Contractors of America and Council for Dredging & Marine Construction Safety filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jan 25 2019	SET FOR ARGUMENT on Monday, March 25, 2019
Jan 28 2019	Brief amici curiae of Alaskan Leader Fisheries LLC, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Jan 28 2019	Brief amicus curiae of The Inland River Harbor and Fleeting Coalition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2019	Brief amici curiae of At-Sea Processors Association, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2019	Brief amici curiae of The Chamber of Commerce of the United States of America and International Group of P&I Clubs filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2019	Brief amici curiae of Fishing Vessels' Reserve, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2019	Brief amicus curiae of American Maritime Association, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2019	Brief amicus curiae of International Association of Drilling Contractors (IADC) filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jan 29 2019	Brief amici curiae of The Greater New Orleans Barge Fleeting Association, Inc. and Offshore Marine Service Association filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jan 29 2019	Brief amicus curiae of Waterways Council, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2019	Brief amicus curiae of The American Waterways Operators filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 14 2019	CIRCULATED
Feb 19 2019	Brief amici curiae of Injured Crewmembers filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 21 2019	Brief of respondent Christopher Batterton filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 21 2019	Record requested from the U.S.C.A. 9th Circuit.
Feb 21 2019	Record from the U.S.C.A 9th Circuit and the District Court is electronic and located on PACER.
Feb 28 2019	Brief amicus curiae of Claimant Seeking Recovery For Wrongful Death Of Crewmember filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**

Feb 28 2019	Brief amicus curiae of Sailors' Union of the Pacific filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 28 2019	Amicus brief of American Association for Justice not accepted for filing. (Corrected version submitted).
Feb 28 2019	Brief amicus curiae of American Association for Justice filed. (March 7, 2019) (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 15 2019	Reply of petitioner The Dutra Group filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 20 2019	Letter of petitioner proposing to lodge copies of pleadings in cited case (The Rolph, 293 F. 269 [N.D. Ca. 1923], aff'd, 299 F. 52 [9th Cir. 1924]) filed. (Distributed) **Main Document**
Mar 25 2019	Argued. For petitioner: Seth P. Waxman, Washington, D. C. For respondent: David C. Frederick, Washington, D. C.
Mar 28 2019	Letter of respondent Christopher Batterton filed. (Distributed) **Main Document**

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No. 18-

IN THE

Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT CERTIORARI

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QUESTIONS PRESENTED

Whether punitive damages may be awarded to a Jones Act seaman in a personal injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.

CORPORATE DISCLOSURE STATEMENT

The Dutra Group is not aware of any parent corporation or any publicly held company that owns 10% or more of its stock.

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IN THE

Supreme Court of the United States

No. 18-

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Dutra Group respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 880 F.3d 1089. The order of the district court denying petitioner's motion to strike or dismiss respondent's claim for punitive damages (App. 17a-21a) is available at 2014 WL 12538172.

JURISDICTION

The court of appeals entered judgment on January 23, 2018. App. 1a. A petition for rehearing was denied

on May 2, 2018. App. 23a. On June 7, 2018, Justice Kennedy extended the time for filing a petition for certiorari to August 30, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

As the court of appeals observed, this case presents an issue "of considerable importance in maritime law" that has "divided" the lower courts: whether punitive damages may be awarded to a seaman in a personal injury suit based on an alleged breach of the general maritime duty to provide a seaworthy vessel. App. 2a. In the decision below, the Ninth Circuit ruled that punitive damages are available on such a claim. That ruling, the court recognized, is in direct conflict with a recent decision of the en banc Fifth Circuit, which held that punitive damages are not available in unseaworthiness cases. *McBride* v. *Estis Well Serv., LLC*, 768 F.3d 382, 388-391 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015).

The disagreement between the Fifth and Ninth Circuits turns largely on how to reconcile this Court's decisions in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990), and *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404 (2009). In *Miles*, the Court unanimously held that damages for loss of society and lost future income may not be awarded in an unseaworthiness action under general maritime law. 498 U.S. at 32-33, 36. The Court stressed that Congress did not authorize either form of damages in negligence actions under the Jones Act, 46 U.S.C. § 30104, which provides remedies for seamen injured or killed in the course of their employment as a result of the employer's negligence. 498 U.S. at 32. The Court explained that respect for Congress's preeminent role in maritime law required that the

scope of recovery under the judge-made action for unseaworthiness—which emerged in its current form as a strict liability claim in the mid-twentieth century—be no more expansive than under the remedies Congress had authorized for negligence in the Jones Act. *See id.* at 32-33.

But in *Townsend*, a closely divided Court held that punitive damages may be awarded in claims based on the separate general maritime doctrine of maintenance and cure.[1] The *Townsend* Court stressed that "[t]he reasoning of *Miles* remains sound." 557 U.S. at 420. Nonetheless, the Court concluded that *Miles* did not control the scope of remedies for maintenance and cure, which (unlike unseaworthiness) was "well established" as a claim before the Jones Act was enacted, and which has "different origins" from and is "independent" of unseaworthiness. *Id.* at 420, 423. The Court also emphasized that there was a "common-law tradition of punitive damages" in the maritime context before the Jones Act was enacted, and it found "no evidence that claims for maintenance and cure were excluded from this general admiralty rule." *Id.* at 414-415, 418.

In the decision below, the Ninth Circuit concluded that *Townsend* rather than *Miles* governs punitive damages in unseaworthiness claims. App. 11a-12a. *Miles*, according to the court, precludes only *nonpecuniary* damages in unseaworthiness actions. But, the court reasoned, punitive damages are neither pecuniary

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[1] Maintenance and cure is a general maritime legal duty requiring a vessel owner to provide wages, food, lodging, and medical treatment to a seaman while he is wounded or ill in the service of the vessel as long as the voyage continues, whether or not the vessel owner caused the injury or illness. *See Townsend*, 557 U.S. at 407-408, 413.

nor nonpecuniary, and so *Miles* does not speak to the availability of punitive damages. App. 12a-13a. By contrast, the Fifth Circuit concluded that punitive damages in unseaworthiness claims are precluded by the reasoning of *Miles*, which limited damages in unseaworthiness claims to those available for negligence under the Jones Act (which does not authorize punitive damages), and that *Townsend*, which concerns the distinct claim for maintenance and cure, is irrelevant to unseaworthiness actions. *See McBride*, 768 F.3d at 388-391.

The courts of appeals—including two that hear the most admiralty cases—are thus irreconcilably divided on whether punitive damages are available in unseaworthiness actions and on how to read this Court's two leading recent decisions on remedies in maritime actions. Only this Court can resolve that conflict. Moreover, the decision below is incorrect and has the potential to harm the economy, the environment, and national security. And the division among the lower courts on this issue undermines the fundamental principle that maritime law should be uniform across the nation. This Court's review is therefore warranted.

STATEMENT

Respondent Batterton alleges that he suffered an injury while he was employed by petitioner as a Jones Act seaman. He sued in the United States District Court for the Central District of California, asserting three claims (as is typical in lawsuits of this nature): breach of the duty to provide a seaworthy vessel under general maritime law, negligence under the Jones Act, and breach of the duty to provide maintenance and cure. App. 2a-3a, 18a. He sought punitive damages on his unseaworthiness claim. App. 18a.

Petitioner moved to strike or dismiss respondent's punitive damages claim on the ground that punitive damages are not available in unseaworthiness actions. The district court denied that motion but certified the issue for interlocutory appeal under 28 U.S.C. § 1292(b). App. 21a, 32a.

Recognizing the issue's "considerable importance in maritime law," the Ninth Circuit accepted the interlocutory appeal. App. 2a. The court then affirmed, and held that punitive damages are "awardable to seamen for their own injuries in general maritime unseaworthiness actions." App. 15a. The panel first determined that the Ninth Circuit had previously answered the question in *Evich* v. *Morris*, 819 F.2d 256, 258 (9th Cir. 1987), a pre-*Miles* decision holding that punitive damages are available on unseaworthiness claims. App. 3a. The panel then concluded that this Court's subsequent decisions in *Miles* and *Townsend* did not change the result, and that it still "would reach the same conclusion *Evich* did." App. 15a.

The court of appeals believed that this case was controlled not by *Miles*, which—like this case—involved an unseaworthiness claim, but by *Townsend*, which involved a claim for maintenance and cure, a cause of action that is not at issue in this petition. Pointing to this Court's language in *Townsend* that there was a "common-law tradition of punitive damages" in the maritime context before the Jones Act was enacted, 557 U.S. at 414, the court of appeals found "no persuasive reason to distinguish maintenance and cure actions from unseaworthiness actions with respect to the damages awardable." App. 4a-5a, 14a.

In contrast, the court of appeals deemed *Miles* irrelevant. *Miles*, it noted, "did not address punitive

damages," and the court found it "not apparent why barring damages for loss of society should also bar punitive damages." App. 10a, 13a. Despite the extensive discussion in *Miles* about the need to conform remedies under the judge-made unseaworthiness action to those available under the Jones Act, *see* 498 U.S. at 32-33, the court read *Miles* to concern only the narrow question whether compensatory damages for unseaworthiness extend to nonpecuniary loss or are limited to pecuniary loss. App. 12a-15a. Because punitive damages "are not compensation for loss at all," the court concluded that *Miles* was inapposite. App. 14a-15a.

The court of appeals expressly rejected the contrary conclusion of the en banc Fifth Circuit in *McBride*, which relied on the reasoning of *Miles* to conclude that punitive damages may not be awarded for unseaworthiness claims. 768 F.3d at 388-391. The court acknowledged that the majority and concurring opinions in *McBride* were "scholarly and carefully reasoned," but nonetheless found the dissenting opinions "more persuasive." App. 14a. In particular, the court believed that the historical rationales for limiting remedies for wrongful death—which, it believed, had been at issue in *Miles*—were inapplicable in personal injury suits like this one. App. 10a-11a. Moreover, according to the court, "[t]he purposes of punitive damages, punishment and deterrence, apply equally" to both unseaworthiness and maintenance and cure. App. 14a (footnote omitted). Thus, the court concluded, "unless Congress legislates on the matter," the availability of punitive damages in unseaworthiness actions is "clearly established." App. 14a-15a.

REASONS FOR GRANTING THE PETITION

The decision below—holding that punitive damages may be awarded in a personal injury case brought under the general maritime doctrine of unseaworthiness—conflicts with decisions of several other appellate courts, most notably that of the en banc Fifth Circuit. The decision also cannot be reconciled with this Court's decision in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990), which held that the damages available in unseaworthiness cases may not exceed the damages Congress allowed when it comprehensively addressed remedies for seamen in the Jones Act. And the decision is deeply troubling as a matter of maritime policy; it threatens to deter productive economic activity, jeopardize national security, and render maritime law incoherent, in an area where uniformity is of fundamental importance. This Court should therefore grant review.

A. The Decision Below Conflicts With Numerous Federal And State Appellate Decisions

1. In *Miles*, this Court held that a seaman asserting an unseaworthiness claim cannot recover damages for loss of society and that a seaman's estate cannot recover his lost future income. 498 U.S. at 30, 32-33, 36. Essential to the Court's decision was its recognition that it "sail[s] in occupied waters." *Id.* at 36. Whereas seamen and their loved ones once had to "look primarily to the courts as a source of substantive legal protection from injury and death," "[m]aritime tort law is now dominated by federal statute." *Id.* at 27, 36. Thus, the Court stated, "an admiralty court should look primarily to these legislative enactments for policy guidance," and "must ... keep strictly within the limits imposed by Congress." *Id.* at 27.

Given those limits on the courts' institutional role in fashioning maritime tort remedies, the Court concluded that any "limit" on damages that Congress has judged appropriate for negligence claims under the Jones Act "forecloses more expansive remedies in a general maritime action founded on strict liability"—*i.e.*, unseaworthiness. *Miles*, 498 U.S. at 31, 36. Indeed, the Court observed, "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault"—again referring to unseaworthiness—than Congress has allowed in cases resulting from negligence under the Jones Act. *Id.* at 32-33. Because the Jones Act permits recovery only for pecuniary loss in negligence actions, the Court held that the Act "precludes" a seaman from recovering for non-pecuniary loss—such as loss of society and lost future income—in claims for unseaworthiness as well. *Id.* at 32 ("The Jones Act ... precludes recovery for loss of society in this case."); *id.* at 36 ("Because [the seaman's] estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law.").

2. The court of appeals' ruling that punitive damages are available in unseaworthiness actions deepens and solidifies a split between appellate courts.

Until recently, federal and state appellate courts had consistently recognized that this Court's reasoning in *Miles* precludes punitive damages in unseaworthiness actions. *See McBride*, 768 F.3d at 388-389; *Horsley* v. *Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Miller* v. *American President Lines, Ltd.*, 989 F.2d 1450, 1455, 1457-1459 (6th Cir. 1993); *Wahlstrom* v. *Kawasaki Heavy Indus. Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993); *Penrod Drilling Corp.* v. *Williams*, 868 S.W.2d

294, 296-297 (Tex. 1993); *Sky Cruises, Ltd.* v. *Andersen*, 592 So. 2d 756, 756 (Fla. Dist. Ct. App. 1992) (per curiam).[2]

That consensus was undone last year when the Washington Supreme Court ruled that "a seaman making a claim for general maritime unseaworthiness can recover punitive damages as a matter of law." *Tabingo* v. *American Triumph LLC*, 391 P.3d 434 (Wash. 2017), *cert. denied*, 138 S. Ct. 648 (2018). The Ninth Circuit has now joined the Washington Supreme Court in rejecting the contrary, and previously uniform, view of appellate courts on that issue.

In *McBride*, the Fifth Circuit comprehensively reviewed the availability of damages in maritime cases and concluded that punitive damages are not available in unseaworthiness actions. *McBride*, 768 F.3d at 389-390; *see also id.* at 391-401 (Clement, J., concurring); *id.* at 401-404 (Haynes, J., concurring).[3] As the Fifth Cir-

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[2] *But cf. Gaither* v. *Hunter Marine Transp., Inc.*, 990 F.2d 442, 442 (8th Cir. 1993) (per curiam) (without analyzing the question, affirming jury verdict apparently awarding "punitive damages" for claim based on unseaworthiness). A few decisions predating *Miles*, such as the Ninth Circuit's earlier decision in *Evich* and the Eleventh Circuit's decision in *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (1987), held that punitive damages were available in unseaworthiness actions, but those decisions cannot survive *Miles* and would conflict with the Fifth Circuit's decision in *McBride* and other appellate decisions. *See* p.16 n.10, *infra*.

[3] Judge Davis's opinion expressed the view of nine of the fifteen judges on the en banc court that punitive damages may not be awarded in unseaworthiness actions. *See McBride*, 768 F.3d at 384-391 (Davis, J.); *see also id.* at 391 (Clement, J., joined by Jolly, Jones, Smith, and Owen, JJ., concurring); *id.* at 401 (Haynes, J., joined by Elrod, J., concurring). Although two of the concurring judges perceived a possible distinction between wrongful death cases and personal injury cases, they concurred in the en banc

cuit explained, *Miles* rather than *Townsend* provides the most direct guidance on that question. *Miles* instructs that courts considering a remedy in unseaworthiness cases should look to whether Congress has authorized that remedy in the Jones Act. *See id.* at 387-390. *Townsend* did not disturb that understanding; indeed, "[t]he Court [in *Townsend*] could not have been clearer in signaling its approval of *Miles* when it added: 'The reasoning of *Miles* remains sound.'" *Id.* at 390 (quoting *Townsend*, 557 U.S. at 420). *Townsend* expressly distinguished claims for maintenance and cure, which were at issue there, from claims for unseaworthiness, which were at issue in *Miles* (and are at issue in this case): Whereas "the maintenance and cure right is 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under the Jones Act,'" "the [Jones Act] negligence/unseaworthiness actions are alternative, overlapping actions derived from the same accident and look toward the same recovery." *Id.* at 389 & n.36 (quoting *Townsend*, 557 U.S. at 423) (brackets omitted).

Thus, the Fifth Circuit concluded that the available remedies must be assessed by reference to the particu-

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court's affirmance of the dismissal of all of the punitive damages claims in that case, and they expressly rejected the dissenters' submission that punitive damages should be available in personal injury cases based on an unseaworthiness claim. *See id.* at 402, 404 (Haynes, J., concurring). They also observed that the arguable "tension ... between (at least) two Supreme Court precedents" can be "definitive[ly] resol[ved]" only by this Court. *Id.* at 404. A subsequent panel in the same case confirmed that the en banc decision "foreclosed" the claims for punitive damages in personal injury unseaworthiness actions (and in negligence actions under the Jones Act). *McBride* v. *Estis Well Serv., LLC*, 853 F.3d 777, 780 n.1 (5th Cir. 2017), *cert. denied sub nom. Touchet* v. *Estis Well Serv.*, 138 S. Ct. 644 (2018).

lar cause of action at issue, and that *Miles* remains undisturbed as the controlling precedent for unseaworthiness actions. Contrary to that analysis, the Ninth Circuit here thought the assessment of available remedies is divorced from the cause of action and thus concluded that *Townsend*—which involved punitive damages but not unseaworthiness—provides the governing framework. That disagreement between the Fifth and Ninth Circuits is especially significant because of the Fifth Circuit's leading role in adjudicating admiralty law (by a wide margin).[4]

Given the division between the Ninth Circuit and the Washington Supreme Court on the one hand, and the Fifth Circuit and several other circuits and state appellate courts on the other hand, the availability of punitive damages in unseaworthiness cases will often turn on the happenstance of where suit is brought.[5]

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[4] *See, e.g., U.S. Court of Appeals—Civil and Criminal Cases Commenced, by Circuit and Nature of Suit or Offense, During the 12-Month Period Ending June 30, 2017*, tbl. B-7 (2017), http://www.uscourts.gov/sites/default/files/data_tables/stfj_b7_630.2017.pdf (17 of 33 cases involving "marine injury" were appealed to the Fifth Circuit); *U.S. Court of Appeals—Civil and Criminal Cases Commenced, by Circuit and Nature of Suit or Offense, During the 12-Month Period Ending June 30, 2015* (2015), tbl. B-7, http://www.uscourts.gov/sites/default/files/b07jun15_0.pdf (21 of 39 cases involving "marine injury" were appealed to the Fifth Circuit); Garwood & Engerrand, *Recent Developments in Admiralty Law in the United States Supreme Court, the Fifth Circuit, and the Eleventh Circuit*, 18 Hous. J. Int'l L. 709, 710 (1996) ("the Fifth Circuit continues to deal with the greatest number of admiralty cases").

[5] A seaman bringing an unseaworthiness claim under general maritime law can choose to file in federal court invoking federal admiralty jurisdiction under 28 U.S.C. § 1333, or in state court under the "saving to suitors" clause of Section 1333. In admiralty, venue is proper in any court that has personal jurisdiction over the

This Court should grant review to resolve the lower courts' disagreement on this important issue and avoid such an arbitrary and inconsistent regime.

B. The Decision Below is Erroneous

1. *Miles* And Other Precedents Make Clear Punitive Damages Are Not Available In Unseaworthiness Actions

The resolution of the question presented is straightforward: Punitive damages are not available in unseaworthiness actions by seamen. This Court's decisions in *Miles* and other cases lead inexorably to that conclusion.

In *Miles*, this Court held that any "limit" that Congress has placed on damages in a negligence action under the Jones Act "forecloses more expansive remedies in a general maritime action founded on strict liability," *i.e.*, unseaworthiness. 498 U.S. at 36. The Court stressed that, were it "to sanction more expansive remedies" in the "judicially created cause of action" for unseaworthiness than Congress has sanctioned for claims of negligence under the Jones Act, it would step outside its proper "place in the constitutional scheme." *Id.* at 32-33.[6] Thus, the Court ruled in *Miles* that, because Congress had not authorized damages for loss of socie-

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defendant. *See In re McDonnell-Douglas Corp.*, 647 F.2d 515, 516 (5th Cir. Unit A 1981); Dougherty et al., 23 Fed. Proc., L. Ed. § 53:52 (West 2018).

[6] *See also* 498 U.S. at 24 ("Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits."); *id.* at 27 ("Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.").

ty and lost future earnings for negligence actions under the Jones Act, the courts also should not award such remedies under the judge-made claim for unseaworthiness. *See id.* at 32-33, 36.

The same is true of punitive damages. It is well settled that punitive damages are not available in negligence actions brought under the Jones Act. As the Fifth Circuit has explained, "no cases have awarded punitive damages" under the nearly century-old Jones Act. *McBride*, 768 F.2d at 388; *see Miller*, 989 F.2d at 1457; *Bergen* v. *F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987); *Kopczynski* v. *The Jacqueline*, 742 F.2d 555, 560-561 (9th Cir. 1984). Under *Miles*, therefore, punitive damages also should not be awarded for unseaworthiness claims.

In *Miles*, the Court determined that the Jones Act precludes awards of loss of society and lost future earnings by looking to the remedies authorized under the Federal Employers Liability Act ("FELA"), which the Jones Act incorporates "unaltered." *Miles*, 498 U.S. at 32. As with loss of society and lost future earnings, punitive damages are not available under FELA. This Court held as much in *Seaboard Air Line Railway* v. *Koennecke*, 239 U.S. 352, 354 (1915), when the Court reviewed a wrongful death complaint brought by heirs of a railroad worker that was ambiguous as to the source of the cause of action, and observed that "[i]f [the complaint] were read as manifestly demanding exemplary damages" (*i.e.*, punitive damages), "that would point to the state law" rather than FELA as the basis for the claim.[7] Courts of appeals have consistently

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[7] The terms "'exemplary, punitive, [and] vindictive'" damages are synonymous. *See Townsend*, 557 U.S. at 410 (quoting *Day v. Woodworth*, 54 U.S. 363, 371 (1851)).

reached the same conclusion: Punitive damages are not available under FELA. *See Wildman* v. *Burlington N. R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987); *Kozar* v. *Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1240 (6th Cir. 1971).

In FELA and the Jones Act, Congress limited recovery to compensatory damages. *See, e.g., Gulf, Colo., & Santa Fe Ry. Co.* v. *McGinnis*, 228 U.S. 173, 175 (1913) ("The recovery [under FELA] must ... be limited to compensating those relatives ... as are shown to have sustained some pecuniary loss."); *Michigan Cent. R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65, 69-71 (1913) (FELA provides "only for compensation for pecuniary loss"); *American R.R. Co. of Porto Rico* v. *Didricksen*, 227 U.S. 145, 149 (1913) ("The damage [under FELA] is limited strictly to the financial loss thus sustained"). As this Court has recognized since before FELA was enacted, punitive damages are not compensatory damages. *See Lake Shore & Mich. S. Ry. Co.* v. *Prentice*, 147 U.S. 101, 107 (1893) ("Exemplary or punitive damages [are] awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others ....").[8] *Miles* instructs that the same limitation should apply to unseaworthiness

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[8] *See also Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 490-493 (2008) (explaining that historically and today, "punitives are aimed not at compensation but principally at retribution and deterring harmful conduct," and are "separate and distinct from compensatory damages"); *Day*, 54 U.S. at 371 (describing "exemplary" damages as stemming from "'the enormity of [the] offense rather than the measure of compensation to the plaintiff'" (alteration in original)); *Restatement (Second) of Torts* § 908(1) (1979) ("Punitive damages are damages, *other than compensatory* or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." (emphasis added)).

claims, and so punitive damages are also not available on such claims.

The court of appeals recognized that punitive damages "are not compensation for loss at all," *see* App. 14a, but it misunderstood the significance of that fact to this case. In the court's view, *Miles* is irrelevant here because that decision addressed only the types of compensatory damages available in unseaworthiness actions—pecuniary, or also nonpecuniary—and did not consider punitive damages at all. *See* App. 12a-15a. But that crabbed reading of *Miles* improperly divorces the result in that case from its fundamental rationale. In *Miles*, this Court stressed over and over that due regard for Congress and for the Judiciary's proper constitutional role requires the courts to limit remedies for unseaworthiness claims to those authorized by Congress in the Jones Act. *See* 498 U.S. at 32-33, 36. Nothing in *Miles* limits that reasoning to distinguishing among the kinds of compensatory damages that are available, or suggests that courts may freely award punitive damages in unseaworthiness cases even though Congress has precluded punitive damages for Jones Act negligence claims, to which unseaworthiness claims are closely connected.

Indeed, decades before *Miles*, this Court observed that the remedies available for unseaworthiness claims are coextensive with those available for Jones Act negligence claims, and that the remedies for both types of claims are limited to compensatory damages. In *Pacific Steamship Co.* v. *Peterson*, 278 U.S. 130 (1928), the Court emphasized the close relation between unseaworthiness claims and Jones Act negligence claims when it explained that "[t]he right to recover *compensatory damages* under the new rule for injuries caused by negligence [*i.e.*, the Jones Act] is ... an alternative of

the right to recover indemnity under the old rules [*i.e.*, general maritime law] on the ground that the injuries were occasioned by unseaworthiness." *Id.* at 138 (emphasis added). Therefore, the Court stressed, "whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew [under the Jones Act], or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to *but one indemnity by way of compensatory damages.*" *Id.* (emphasis added).[9] And in *Townsend*, the Court reaffirmed its prior recognition that unseaworthiness is "'an alternative of[] the right to recover compensatory damages under the Jones Act.'" 557 U.S. at 423 (quoting *Peterson*, 278 U.S. at 138).[10]

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[9] *See also McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 225 (1958) (unseaworthiness and Jones Act negligence are "alternative 'grounds' of recovery for a single cause of action" (citing *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316 (1927))).

[10] A handful of pre-*Miles* appellate decisions indicated that punitive damages could be available for claims of unseaworthiness. The leading decisions to that effect were *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1972), and *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. Unit B July 1981). As Judge Clement explained in *McBride*, those cases failed to account for the Court's emphasis in cases such as *Peterson* on the close connection between Jones Act negligence and unseaworthiness, and relied on older cases that did not involve unseaworthiness. 768 F.3d at 395-401 (Clement, J., concurring). Further, *Merry Shipping* and similar decisions relied on cases indicating that loss of society damages were available in unseaworthiness claims—a premise specifically rejected by this Court in *Miles*. *See* 650 F.2d at 624-625. The Fifth Circuit has therefore properly determined that *Miles* "effectively overruled" *Merry Shipping*. *See Guevara* v. *Maritime Overseas Corp.*, 59 F.3d 1496, 1507 (5th Cir. 1995), *abrogated by Townsend on other grounds*, 557 U.S. 504. Other

The court of appeals thought it could not read *Miles* to foreclose punitive damages in unseaworthiness actions because this Court had stated in *Miles*, "The Jones Act evinces no general hostility to recovery under maritime law. It does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness." 498 U.S. at 29, *quoted in* App. 9a. But that passage in *Miles* did not concern the scope of remedies for unseaworthiness claims; it was addressed to the available causes of action. That remark was made in the Court's discussion of whether to recognize a cause of action for wrongful death based on unseaworthiness, not in its later analysis of whether to permit recovery for nonpecuniary loss in such actions. *See* 498 U.S. at 29. The Court did recognize the wrongful death action—but separately, it also refused to allow damages for nonpecuniary loss because such damages are not available for Jones Act negligence. *See id.* at 29-30. Nothing in *Miles* supports the decision below; to the contrary, *Miles* makes clear that the court of appeals erred.

2. *Townsend*'s Framework Does Not Apply To Unseaworthiness Actions

The court of appeals read *Townsend* to hold that punitive damages should be available for all maritime claims unless Congress has affirmatively withdrawn them as a remedy. App. 14a-15a. That decision reflects a profound misunderstanding of *Townsend*—including its express reaffirmance of *Miles* as "sound," 557 U.S. at 420. *Miles* and *Townsend* make clear that the remedies available for general maritime claims depend on

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cases following *Merry Shipping* are similarly flawed. *See Evich*, 819 F.2d at 258; *Self*, 832 F.2d at 1550.

the particular cause of action—and especially on the understanding that Congress has limited the remedies for cognate causes of action. *Compare Miles*, 498 U.S. at 32 (stressing that Congress had limited remedies for Jones Act negligence), *with Townsend*, 557 U.S. at 419 (noting that Congress had not addressed remedies for maintenance and cure).

The Court in *Townsend* addressed only punitive damages in maintenance and cure actions and expressly distinguished its ruling on unseaworthiness actions in *Miles*. 557 U.S. at 420. There are several reasons why the remedies available for the two causes of action might differ. First, unseaworthiness is a twin of Jones Act negligence, but maintenance and cure is not. As the Court in *Townsend* explained, unseaworthiness is "'an alternative of[] the right to recover compensatory damages under the Jones Act,'" such that "the seaman may have ... one of the ... two." *Townsend*, 557 U.S. at 423-424; *see Peterson*, 278 U.S. at 138 (Jones Act negligence is "an alternative of the right to recover indemnity ... [for] unseaworthiness"); *McAllister*, 357 U.S. at 225 (unseaworthiness and Jones Act negligence are "alternative 'grounds' of recovery for a single cause of action"). Both unseaworthiness and Jones Act negligence claims may be brought to redress a seaman's personal injury or death occurring in the scope of his employment.

In contrast, "the maintenance and cure right is 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under the Jones Act,'" and thus "the seaman may have maintenance and cure *and*" a Jones Act negligence (or unseaworthiness) recovery. *Townsend*, 557 U.S. at 423-424 (quoting *Peterson*, 278 U.S. at 138) (emphasis added). Indeed, maintenance and cure is not even a tort but ra-

ther is a "contractual right." *Peterson*, 278 U.S. at 139; *see also Weeks Marine, Inc.* v. *Garza*, 371 S.W.3d 157, 163 (Tex. 2012).

Second, the judicial origins of the contemporary theory of unseaworthiness liability are quite different from the origins of maintenance and cure—a point stressed by this Court in *Miles*. More than two decades after the Jones Act was enacted, unseaworthiness underwent a "revolution" in which "this Court transformed the warranty of seaworthiness into a strict liability obligation." *Miles*, 498 U.S. at 25-26 (quotation marks omitted). "As a consequence of this radical change, unseaworthiness" went from "an obscure and relatively little used remedy" to "the principal vehicle for recovery by seamen for injury or death." *Id.* at 25-26 (quotation marks omitted). After that dramatic broadening of the doctrine of unseaworthiness, this Court deemed it "inconsistent with [its] place in the constitutional scheme" to extend unseaworthiness yet further, and "to sanction more expansive remedies" for unseaworthiness than Congress did for negligence under the Jones Act. *Id.* at 32-33; *see also McBride*, 768 F.3d at 399-401 (Clement, J., concurring).

Again in contrast, the doctrine of maintenance and cure has not undergone a "revolution." *Miles*, 498 U.S. at 25 (quotation marks omitted). Rather, "the legal obligation to provide maintenance and cure dates back centuries." *Townsend*, 557 U.S. at 413. A "seaman's right to maintenance and cure is 'ancient,'" *McBride*, 768 F.3d at 393 (Clement, J., concurring) (quoting *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 527 (1938)), and "has remained unchanged in substance for centuries," *McBride*, 768 F.3d at 415 (Higginson, J., dissenting).

Those differences led this Court to conclude in *Townsend* that the congressional remedial judgments embodied in the Jones Act did not foreclose the courts from awarding punitive damages in claims for maintenance and cure. But unseaworthiness and Jones Act claims remain as closely connected as they were before, and the reasoning in *Miles* cannot be confined to any specific remedy. Thus, allowing punitive damages in unseaworthiness actions when Congress has foreclosed them in negligence actions—as with allowing nonpecuniary damages for lost society or lost income—would go "well beyond the limits of Congress's ordered system of recovery." *Miles*, 498 U.S. at 36.[11]

3. *Miles* Applies To Both Wrongful Death Actions And Personal Injury Actions

The court of appeals also suggested that the limits on remedies for unseaworthiness claims that this Court recognized in *Miles* apply only to wrongful death actions, and not personal injury suits like this case. The court believed that the "limitations" on recovery under the Jones Act are "based on the restrictive recoveries permitted for wrongful death," which "have no application to general maritime claims by living seamen for injuries." App. 14a. That reading of *Miles* is plainly wrong.

The central holding of *Miles* is that the courts may not expand the scope of recovery for the judge-made action of unseaworthiness beyond what Congress has allowed for negligence under the Jones Act. *See* 498

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[11] Even under the *Townsend* framework, however, punitive damages would not be available here; as Judge Clement explained in *McBride*, there is no tradition of recognizing punitive damages in unseaworthiness actions. 768 F.3d at 395-399.

U.S. at 22-23, 32-33. That holding is not limited to wrongful death cases. To the contrary, the Court noted in *Miles* that "[t]he Jones Act provides an action in negligence for the death or *injury* of a seaman." *Id.* at 29 (emphasis added).[12] The separation of powers concerns that animated the Court's analysis do not depend on whether the action is for death or injury. This Court said so in *Miles* itself: "We will not create, under our admiralty powers, a remedy ... that goes well beyond the limits of Congress' ordered system of recovery for seamen's *injury* and death." *Id.* at 36 (emphasis added).[13]

The "constitutional mandate" to achieve "uniform" maritime law—which this Court heeded in *Miles*, both in recognizing wrongful death actions and in disallowing recovery for loss of society and survival rights in unseaworthiness actions, *see* 498 U.S. at 27, 29-30, 33, 35, 37—also precludes recognition of punitive damages for personal injury claims based on unseaworthiness. Reading *Miles* to reach only wrongful death claims would make a crazy quilt of remedies for seamen's injuries. As discussed, the Jones Act disallows punitive damages based on negligence in both personal injury and wrongful death actions. *See* pp. 12-14, *supra*. Al-

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[12] *See* 46 U.S.C. § 30104 ("A seaman injured in the course of employment or, if the seaman dies from the injury ....").

[13] FELA, which the Jones Act incorporates, also provides remedies for an employee's personal injury or death. *See* 45 U.S.C. § 51 ("Every common carrier by railroad while engaging in commerce ... shall be liable in damages to any person *suffering injury* ...." (emphasis added)); *The Arizona* v. *Anelich*, 298 U.S. 110, 118 (1936) ("the Federal Employers' Liability Act, thus incorporated in the Jones Act by reference, gives a right of recovery for the injury or death of an employee of a common carrier by rail" (emphasis added)).

lowing recovery of punitive damages for unseaworthiness (but not negligence) if a seaman was injured (but not killed) would create serious "anomalies" in maritime law. *Miles*, 498 U.S. at 26.

There is no justification for such anomalies. In the nineteenth century, personal injury claims and wrongful death actions may have followed different paths of development, but this Court long ago rejected those happenstances of legal history as a guide to the maritime remedies that should be available today. The ancient common law rule permitting suit based on personal injury but not death "had little justification except in primitive English legal history," and "it is difficult to discern an adequate reason for its extension to admiralty." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 379, 381 (1970). This Court therefore jettisoned the old rule and recognized wrongful death actions under general maritime law because "there is no present public policy" to treat death differently from injury in this context—a judgment Congress also reached in the Jones Act. *Id.* at 382-383, 388-390; *id.* at 405 (old "rule ... produces different results for breaches of duty in situations that cannot be differentiated in policy"); *see Miles*, 498 U.S. at 27-30.

The Court has consistently recognized the importance of adopting "a uniform rule" of recovery for injuries under maritime law. *Miles*, 498 U.S. at 33. It would be strange for the more serious penalty (punitive damages) to be available only for the less serious result (injury). That would be stranger still given that sometimes a seaman's death may occur long after the accident, when the full effects of the injury are finally felt. A plaintiff's entitlement to punitive damages, and a vessel owner's liability for them, should not shift and

spring depending on the vagaries of whether a particular seaman eventually dies of his injuries.

C. The Importance Of The Question Presented Warrants This Court's Immediate Review

This case presents an important question of federal law warranting this Court's review. The court of appeals' decision will have serious and adverse consequences for the maritime industry and the nation as a whole.

The domestic maritime industry may often go unnoticed by the average American, but it has a substantial effect on the economy. The nation's commercial fleet comprises more than 40,000 fishing boats, tankers, container ships, tugboats, barges, ferryboats, cruise ships, water taxis, and other working vessels.[14] Operating along the country's seacoasts and throughout its internal waterways, those vessels transport about 100 million passengers for work and pleasure each year, as well as every conceivable type of raw material and consumer goods for export or distribution, including seafood, agricultural products, crude and finished petroleum products, and steel.[15] For example, in 2009, U.S. marine vessels transported $1 trillion worth of imports

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[14] American Maritime Partnership, *Frequently Asked Questions*, https://www.americanmaritimepartnership.com/faq/ (visited Aug. 22, 2018).

[15] Navy League of the United States, *America's Maritime Industry: The Foundation of American Seapower* 7-8, 14, https://navyleague.org/files/legislativeaffairs/americas-maritime-industry.pdf (visited Aug. 22, 2018); *Frequently Asked Questions*, *supra* n.14.

and exports.[16] All told, the maritime industry annually accounts for about $30 billion in wages, $11 billion in taxes, and $100 billion in economic output.[17]

In particular, the dredging work performed by companies such as petitioner is essential to maintaining the vitality of our economy and ensuring commerce is carried out safely and efficiently. That dredging, performed by companies on behalf of the U.S. Army Corps of Engineers and others, ensures that thousands of miles of internal waterways that span the nation remain navigable.[18] A financially healthy maritime transportation industry is essential to those operations.

Maritime transportation does all this in a relatively cost-effective and environmentally friendly way.[19] Maritime shipping costs have been declining, whereas the costs for other modes of freight transportation have

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[16] *The Foundation of American Seapower*, *supra* n.15, at 12-13.

[17] *Id.* at 14; American Maritime Partnership, *What We Do*, https://www.americanmaritimepartnership.com/about-amp/what-we-do/ (visited Aug. 22, 2018).

[18] U.S. Army Corps of Engineers, *Inland Waterway Navigation: Value to the Nation*, http://www.mvp.usace.army.mil/Portals/57/docs/Navigation/InlandWaterways-Value.pdf (visited Aug. 22, 2018).

[19] *The Foundation of American Seapower*, *supra* n.15, at 4, 7, 11, 15; *see also* Texas Transportation Institute, Center for Ports and Waterways, *A Modal Comparison of Domestic Freight Transportation Effects on the General Public* 34, 38 (2007), https://www.marad.dot.gov/wp-content/uploads/pdf/Phase_II_Report_Final_121907.pdf (comparing the energy efficiencies and emissions generated by highway, railroad, and maritime transport, and finding maritime transport to be consistently more energy efficient and to generate fewer emissions).

been increasing.[20] Maritime transportation thus keeps costs down to consumers—and also to the American taxpayer, since U.S. commercial vessels play a vital role in transporting our servicemembers and their supplies around the world, including 95% of the dry cargoes to U.S. and Coalition Forces in Iraq and Afghanistan since 2008.[21] Indeed, a robust domestic maritime industry is essential to American military readiness and strength.[22]

By exposing vessel owners and operators to punitive damages for claims of unseaworthiness, the decision below creates "devastating potential for harm" to the industry and the national economy, environment, and security. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting). As Judge Clement explained in *McBride*, the increased cost to owners and operators resulting from potential liability for punitive damages are likely to "be eventually passed along to consumers," whether private or governmental. 768 F.3d at 401; *see also, e.g., In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1490 (D.C. Cir. 1991) ("The award of punitive damages ... would increase the amount of litigation, the cost of insurance, and ultimately the price of air transportation."). And "[g]iven the sizeable percentages of the world's goods that travel on ships, ... the decision in this case needs to have only the minutest impact on shipping prices to have a significant aggregate cost for consumers." *McBride*, 768 F.3d at 401 (Clement, J., concurring). Faced with higher prices, consumers may

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[20] *The Foundation of American Seapower*, *supra* n.15, at 15.

[21] *Id.* at 16-17.

[22] *Id.* at 16-18.

choose to buy less, and manufacturers, distributors, and exporters may shift to other modes of transportation, which may be less environmentally friendly and which cannot substitute for the maritime industry's role in supporting U.S. military and homeland security operations.

The decision below also contravenes "the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Miles*, 498 U.S. at 27 (quotation marks omitted); *see also The Lottawanna*, 88 U.S. 558, 575 (1874). As explained above (pp. 8-9), the court of appeals' decision deepens a conflict among appellate courts about the availability of punitive damages, increasing uncertainty and costs. The decision also creates inconsistency between claims based on negligence and claims based on unseaworthiness, as well as between personal injury and wrongful death actions. *Supra* pp. 12-15, 19-20, 22.

In light of all of those detrimental effects of the court of appeals' decision, this Court's review is warranted now, even though there has not yet been a trial in this case. The Ninth Circuit has definitively ruled that punitive damages are available in unseaworthiness cases. Its decision is likely to have an *in terrorem* effect, pressuring maritime employers to settle even meritless unseaworthiness claims to avoid the prospect of an overwhelming award of punitive damages.[23] That

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[23] *See* Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1156 (1984) (describing "the now universal practice of plaintiffs alleging and demanding punitive damages in an effort ... to compel defendants to settle meritless cases because of the fear that a jury will return an outrageous punitive damage award"); Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Deci-*

settlement pressure is particularly strong for strict liability claims like unseaworthiness, where no allegation of fault is necessary to survive a dispositive motion and any trial carries the possibility of a runaway jury verdict.

This Court granted review in *Townsend* when that case was in the same procedural posture. Like the district court here, the district court in *Townsend* denied a motion to dismiss the punitive damages claim but certified the question for interlocutory appeal. 557 U.S. at 408. Like the court of appeals here, the Eleventh Circuit agreed to hear the interlocutory appeal and affirmed the district court's ruling. *Id.* This Court granted certiorari, recognizing the importance of immediately resolving a conflict on the availability of punitive damages in maintenance and cure actions. The same is true here, and it is appropriate and imperative for the Court to grant immediate review of the court of appeals' decision in this case.

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sions Affect Class Actions, 60 Baylor L. Rev. 880, 916 (2008) (when a case "includes a claim for punitive damages claim, the combined settlement pressure increases exponentially"); Baker, *Transforming Punishment into Compensation: In the Shadow of Punitive Damages*, 1998 Wis. L. Rev. 211, 229-232 (1998) (noting that insurance companies have a good-faith obligation to settle compensatory damages claims to protect their insureds from a possible punitive damages verdict); *id.* at 212 ("it is possible that the 'shadow' cast by punitive damages awards in the settlement process is much larger than would be predicted by simple extrapolation from trial verdicts"); Berch & Berch, *An Essay Regarding* Gasperini v. Center for Humanities, Inc. *and the Demise of the Uniform Application of the Federal Rules of Civil Procedure*, 69 Miss. L.J. 715, 727 n.49 (1999) (describing "the concomitant increase in the settlement value of a case once a claim for punitive damages is added").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2018

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56775
D.C. No. 2:14-cv-07667-PJW

CHRISTOPHER BATTERTON,
Plaintiff-Appellee,

v.

DUTRA GROUP,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Patrick J. Walsh, Magistrate Judge, Presiding

Argued and Submitted February 8, 2017
Pasadena, California
Filed January 23, 2018

Before: Sidney R. Thomas, Chief Judge, and Andrew J. Kleinfeld and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Kleinfeld

* * *

OPINION

KLEINFELD, Senior Circuit Judge:

We address the availability of punitive damages for unseaworthiness.

This case comes to us on a 28 U.S.C. § 1292(b) certification for interlocutory appeal. The district court certified the appeal, and we granted permission for it. District courts within our circuit have divided on the substantive issue,[1] as have the circuits,[2] and the issue is of considerable importance in maritime law.

Facts

The case comes to us on the pleadings and nothing else. The district court denied a motion to strike the portion of the prayer seeking punitive damages for unseaworthiness. We therefore take our facts from the complaint. They are not proved, and we intimate no view as to whether punitive damages may ultimately turn out to be appropriate.

The plaintiff, Christopher Batterton, was a deckhand on a vessel owned and oper ed by the defendant, Dutra Group. While Batterton was working on the vessel in navigable waters, a hatch cover blew open and crushed his left hand. Pressurized air was being pumped into a compartment below the hatch cover, and the vessel lacked an exhaust mechanism to relieve the

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[1] *Compare, e.g., Rowe v. Hornblower Fleet*, No. C-11-4979 JCS, 2012 WL 5833541, at *900 (N.D. Cal. Nov. 16, 2012) *and Wagner v. Kona Blue Water Farms, LLC*, 2010 A.M.C. 2469, 2483 (D. Haw. Sept. 13, 2010) *with Jackson v. Unisea, Inc.*, 824 F. Supp. 895, 897–98 (D. Alaska 1992) *and Complaint of Aleutian Enter., Ltd.*, 777 F. Supp. 793, 796 (W.D. Wash. 1991).

[2] *Compare Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987), *overruling on other grounds acknowledged by Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 553–54 (9th Cir. 1996) *and Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987) *with McBride v. Estis Well Service*, 768 F.3d 382, 384 (5th Cir. 2014) (en banc) *and Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994).

pressure when it got too high. The lack of a mechanism for exhausting the pressurized air made the vessel unseaworthy and caused permanent disability and other damages to Batterton.

Analysis

The only question before us is whether punitive damages are an available remedy for unseaworthiness claims. We answered it in *Evich v. Morris*.[3] That would be the end of the case, except that Dutra contends, and the Fifth Circuit agrees,[4] that the later Supreme Court decision in *Miles v. Apex Marine Corp.*[5] implicitly overrules *Evich*.

In *Evich* we squarely held that "[p]unitive damages are available under general maritime law for claims of unseaworthiness, and for failure to pay maintenance and cure."[6] We distinguished Jones Act claims, where punitive damages are unavailable.[7] The standard for punitive damages, we held, was "conduct which manifests 'reckless or callous disregard' for the rights of others ... or 'gross negligence or actual malice [or] criminal indifference.'"[8]

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[3] 819 F.2d at 258.

[4] *See McBride*, 768 F.3d at 384.

[5] 498 U.S. 19 (1990).

[6] 819 F.2d at 258 (citations omitted).

[7] *Id.*

[8] *Id.* at 258–59 (quoting *Protectus Alpha Nav. Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985)).

Evich was a wrongful death case, not an injury case.[9] But we did not speak to whether there might be any distinction regarding the availability of punitive damages according to whether the seaman had died. Generally, the availability of damages is more restricted in wrongful death cases than in injury cases. So without authority to the contrary, we have no reason to distinguish *Evich* and limit its holding to wrongful death cases. No party has suggested that we do so.

Under *Miller v. Gammie*,[10] we must follow *Evich* unless it is "clearly irreconcilable" with the Supreme Court's decision in *Miles*.[11] *Miles* holds that loss of society damages are unavailable in a general maritime action for the wrongful death of a seaman and that lost future earnings are unavailable in a general maritime survival action.[12] That is because wrongful death damages are limited to "pecuniary loss"[13] and because "[t]he Jones Act/[Federal Employers' Liability Act] survival provision limits recovery to losses suffered during the decedent's lifetime."[14]

The Supreme Court's more recent decision in *Atlantic Sounding Co. v. Townsend*[15] speaks broadly: "Historically, punitive damages have been available and awarded in general maritime actions, including

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[9] *Id.* at 258.

[10] 335 F.3d 889 (9th Cir. 2003).

[11] *Id.* at 893.

[12] *Miles*, 498 U.S. at 37.

[13] *Id.* at 32.

[14] *Id.* at 36.

[15] 557 U.S. 404 (2009).

some in maintenance and cure."[16] Unseaworthiness is a general maritime cause of action.[17] *Townsend* reads *Miles* as limiting the availability of damages for loss of society and lost future earnings[18] and holds that *Miles* does not limit the availability of punitive damages in maintenance and cure cases.[19] By implication, *Townsend* holds that *Miles* does not limit the availability of remedies in other actions "under general maritime law,"[20] which includes unseaworthiness claims.

Arguably, *Townsend* leaves room for a distinction between maintenance and cure claims and unseaworthiness claims. The Court recognizes that "remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures."[21] But nothing in *Townsend*'s reasoning suggests that such a distinction would mean that a limitation ought to be made on the availability of punitive damages as a remedy for general maritime unseaworthiness claims.

So far our discussion suggests that *Miles* does not overturn *Evich*, that *Evich* remains in force as controlling circuit law, and that *Evich*'s holding that punitive damages are available as a remedy for unseaworthiness

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[16] *Id.* at 407.

[17] *See id.* at 419; *see also Miles*, 498 U.S. at 29.

[18] *Townsend*, 557 U.S. at 419.

[19] *Id.*

[20] *Id.* at 421.

[21] *Id.* at 423 (quoting *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 18 (1963)).

claims is undisturbed and binding. Appellant's arguments to the contrary, though, are given force by *McBride v. Estis Well Service.*[22]

McBride, a sharply divided Fifth Circuit en banc decision, holds that "punitive damages are non-pecuniary losses"[23] and therefore may not be recovered under the Jones Act or under the general maritime law.[24] We held in another context in *Kopczynski v. The Jacqueline* that "[p]unitive damages are non-pecuniary" and so are not allowable under the Jones Act.[25] *McBride* has five extensive and scholarly opinions addressing all sides of the question. Six dissenters note that *Miles* "addressed the availability of loss of society damages to non-seamen under general maritime law, not punitive damages,"[26] and that "*Townsend* announced the default rule that punitive damages are available for actions under the general maritime law (such as unseaworthiness)."[27]

Well before our decision in *Evich*, the Supreme Court addressed in *Moragne v. States Marine Lines, Inc.*[28] whether the general maritime law affords a cause of action for wrongful death. The Court overruled its 1886 decision that it did not.[29] Though *Moragne* con-

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[22] 768 F.3d 382 (5th Cir. 2014) (en banc).

[23] *Id.* at 384.

[24] *Id.*

[25] 742 F.2d 555, 561 (9th Cir. 1984).

[26] 768 F.3d at 408–09 (Higginson, J., dissenting).

[27] *Id.* at 413 n.16; *see id.* at 418.

[28] 398 U.S. 375 (1970).

[29] *Id.* at 409 (overruling *The Harrisburg*, 119 U.S. 199 (1886)).

cerns the availability of a wrongful death action under the general maritime law, it matters in our case, where the seaman did not die, because it bears on how we should understand *Miles*.

Moragne holds that the denial of a wrongful death remedy "had little justification except in primitive English legal history."[30] Lord Ellenborough had held in *Baker v. Bolton* that in "a Civil court, the death of a human being could not be complained of as an injury."[31] The Court noted that there was no good reason to maintain this "barbarous" view,[32] let alone extend it to the maritime law, the principles of which "included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages."[33] In any event, the common law rule had been overturned in England by Lord Campbell's Act, in American states by wrongful death statutes, and in our federal law by the Federal Employers' Liability Act, the Death on the High Seas Act, and the Jones Act.[34] The Court noted that its "transformation of the shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence" had made unseaworthiness doctrine "the principal vehicle for recovery by seamen for injury or death."[35] It concluded that the limitations of the Death on the High Seas Act did

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[30] *Id.* at 379.

[31] *Id.* at 383 (quoting Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808)).

[32] *Id.* at 381.

[33] *Id.* at 387.

[34] *Id.* at 389–90, 394.

[35] *Id.* at 399.

not preclude the availability of a wrongful death remedy under the general maritime law where the Act did not apply.[36]

Three years after our decision in *Evich*, the Supreme Court decided *Miles v. Apex Marine Corp.*[37] *Miles* was a wrongful death case.[38] The immediate issues before the Court were whether the parent of a deceased seaman could recover under the general maritime law for loss of society and whether a seaman's lost future earnings claim survived his death.[39] A fellow crew member had stabbed a seaman to death.[40] His mother brought a Jones Act negligence claim for failure to prevent the deadly assault and a general maritime unseaworthiness claim for hiring an unfit crew member.[41] Among other things, she sought loss of society, lost future income, and punitive damages.[42] The jury, though it found negligence, rejected the unseaworthiness claim, returning a verdict that the ship was seaworthy.[43] The Fifth Circuit reversed, holding that because of the extraordinarily violent disposition of the

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[36] *Id.* at 402.

[37] 498 U.S. 19 (1990).

[38] *Id.* at 21.

[39] *Id.* at 23.

[40] *Id.* at 21.

[41] *Id.*

[42] *Id.* at 21–22.

[43] *Id.* at 22.

fellow crewman, the ship was unseaworthy as a matter of law.[44]

Miles declined to limit *Moragne* to its facts.[45] The Court noted that the "Jones Act evinces no general hostility to recovery under maritime law."[46] It does not "disturb seamen's general maritime claims for injuries resulting from unseaworthiness."[47] Nor does it "preclude the recovery for wrongful death due to unseaworthiness."[48] The permissibility of a punitive damages award was not before the Court, just loss of society and of future earnings.[49]

The basis for Dutra's argument that *Miles* implicitly overturns *Evich* is *Miles*'s discussion of damages. Noting that the Death on the High Seas Act limited the availability of damages for wrongful death to "*pecuniary* loss sustained by the persons for whose benefit the suit is brought,"[50] the Court held that damages "for non-pecuniary loss, such as loss of society, in a general maritime action" are barred.[51] Likewise, Lord Campbell's Act, which is the basis for most state and federal statutes for wrongful death recovery, had long been in-

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[44] *Id.*

[45] *Id.* at 27.

[46] *Id.* at 29.

[47] *Id.*

[48] *Id.*

[49] *See id.* at 23.

[50] *Id.* at 31 (quoting then 46 U.S.C. App. § 762, now 46 U.S.C. App. § 30303).

[51] *Id.*

terpreted to provide recovery only for pecuniary loss.[52] And so the Court concluded that the Jones Act, too, having inherited the Supreme Court's interpretation in *Vreeland* of Lord Campbell's Act and the Federal Employers' Liability Act, also limited recovery to "pecuniary loss."[53] The Court therefore held that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman."[54]

But it is not apparent why barring damages for loss of society should also bar punitive damages. *Miles* itself suggests no such broad interpretation of "pecuniary loss"—it expressly notes that the Jones Act "evinces no general hostility to recovery under maritime law" and "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness."[55] Lord Campbell's Act and its progeny provide an opportunity for a sailor's widow and children to recover the money that they were deprived of by his death. That is what "pecuniary loss" means: loss of money.[56] Non-pecuniary damages have long been understood to mean claims for such injuries as physical pain, mental anguish, or humiliation,[57] as well as loss of consortium. Punitive damages, allowed by *Evich*, are not "pecuni-

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[52] *Id.* at 32.

[53] *Id.* (citing *Michigan Cent. R. Co. v. Vreeland*, 227 U.S. 59, 69–71 (1913)).

[54] *Id.* at 33.

[55] *Id.* at 29.

[56] *See Pecuniary and Pecuniary Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[57] CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 105 (West 1935).

ary loss." Though they are pecuniary, that is, like all damages, for money, they are not for loss. They are punitive, not compensatory. Their relationship to loss is that they may not exceed some multiple of the compensatory damages.[58]

That a widow may not recover damages for loss of the companionship and society of her husband has nothing to do with whether a ship or its owners and operators deserve punishment for callously disregarding the safety of seamen. One might reasonably argue that loss of society is more important than such punishment, or that such punishment is more important than loss of society. However, it cannot reasonably be argued that they are both compensation for "loss." If they were, they would fall within the rubric of compensatory damages, not punitive damages.

Following *Miles*, we held in *Smith v. Trinidad Corp.* that loss of consortium damages are unavailable to the wives of injured mariners in their own actions under the Jones Act or general admiralty law.[59] And we noted in *Chan v. Society Expeditions, Inc.* that neither the general maritime law nor the Jones Act permits recovery for loss of society for the wrongful death of a seaman, nor does the Jones Act permit it for injury.[60] Neither speaks to punitive damages.

Whatever room might be left to support broadening *Miles* to cover punitive damages was cut off by the Supreme Court's decision in *Atlantic Sounding Co. v.*

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[58] *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513–15 (2008).

[59] 992 F.2d 996 (9th Cir. 1993).

[60] 39 F.3d 1398, 1407 (9th Cir. 1994).

Townsend.[61] The shipowner in *Townsend* argued that *Miles* barred punitive damages for willful failure to pay maintenance and cure.[62] The Court noted that "[h]istorically, punitive damages have been available and awarded in general maritime actions."[63] It found "that nothing in *Miles* or the Jones Act eliminates that availability."[64] Unseaworthiness is a general maritime action long predating the Jones Act.[65]

It is true, as Dutra contends, that *Miles*, taken alone, might arguably be read to suggest that the available damages for a general maritime unseaworthiness claim by an injured seaman should be limited to those damages permissible under the Jones Act for wrongful death. But that is a stretch. The remark upon which Dutra relies is *Miles*'s justification for its narrower conclusion: "that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman."[66] Dutra takes that narrow remark out of context and reads it expansively.[67] *Miles*'s jux-

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[61] 557 U.S. 404 (2009).

[62] *Id.* at 418–19.

[63] *Id.* at 407.

[64] *Id.*

[65] *See id.* at 419; *see also Miles*, 498 U.S. at 29; *Tabingo v. Am. Triumph LLC*, 391 P.3d 434, 438–40 (Wash. 2017).

[66] *Miles*, 498 U.S. at 33.

[67] *Miles* states:

> The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that Torregano had been killed as a result of the

taposition of the terms "pecuniary" and "non-pecuniary loss" was with reference to loss of society, not punitive damages.[68] *Miles* did not address punitive damages. It expressly noted that the Jones Act "evinces no general hostility to recovery under maritime law" and "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness."[69] *Miles* further holds that lost future earnings are unavailable in a general maritime survival action.[70] But that is because "[t]he Jones Act/[Federal Employers' Liability Act] survival provision limits recovery to losses suffered during the decedent's lifetime."[71]

It is also true, as Dutra argues, that if we were to interpret *Miles* broadly and *Townsend* narrowly, as the Fifth Circuit has in *McBride*, then we might infer that *Miles* implicitly overruled *Evich*. But we would then have to disregard *Miles*'s statement that the Jones Act "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness."[72] The Fifth

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> unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

Id. at 32–33.

[68] *See id.* at 31–33.

[69] *Id.* at 29.

[70] *Id.* at 36.

[71] *Id.*

[72] *Id.* at 29.

Circuit's leading opinions in *McBride* are scholarly and carefully reasoned, but so are the dissenting opinions, which to us are more persuasive.

Starting with Lord Campbell's Act, and continuing through the Federal Employers' Liability Act, the Death on the High Seas Act, and the Jones Act, wrongful death is a statutory cause of action.[73] There is no way to compensate a dead seaman for the wrong done to him. Compensation for his survivors is generally limited by statute to their resulting "pecuniary loss."[74] These limitations, based on the restrictive recoveries permitted for wrongful death, have no application to general maritime claims by living seamen for injuries to themselves. The *Townsend* Court made this distinction when addressing maintenance and cure actions,[75] and there is no persuasive reason to distinguish maintenance and cure actions from unseaworthiness actions with respect to the damages awardable. The purposes of punitive damages, punishment and deterrence,[76] apply equally to both of these general maritime causes of action. Nor are punitive damages compensation for a pecuniary or non-pecuniary "loss," as described in *Miles*.[77] They are not compensation for loss at all. One might argue for or against the desirability of punitive damages, but unless Congress legislates on the matter, their availability is clearly established not only in

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[73] *Id.* at 31–32.

[74] *Id.* at 31, 32 (citing *Vreeland*, 227 U.S. at 69–71).

[75] 557 U.S. at 419–20.

[76] *See Exxon Shipping Co.*, 554 U.S. at 492–93.

[77] *See* 498 U.S. at 30–33.

Townsend[78] but also in *Baker*.[79] They have been recognized as proper in appropriate circumstances since *The Amiable Nancy*.[80]

Conclusion

The district court correctly denied Dutra's motion to strike the prayer for punitive damages. They are indeed awardable to seamen for their own injuries in general maritime unseaworthiness actions. Under *Miller v. Gammie*,[81] we cannot treat *Evich* as overruled by *Miles* unless *Miles* is "fundamentally inconsistent with the reasoning"[82] of *Evich* and *Evich* is "clearly irreconcilable"[83] with *Miles*. It is not. Under the *Miller* standard, *Evich* remains good law. And under *Townsend*, we would reach the same conclusion *Evich* did, even if we were not bound by *Evich*.

AFFIRMED.

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[78] 557 U.S. at 407 ("Historically, punitive damages have been available and awarded in general maritime actions ... . We find that nothing in *Miles* or the Jones Act eliminates that availability.").

[79] 554 U.S. at 489–90, 515 (noting that the issue of punitive damages in maritime law "falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result," and allowing an award of punitive damages).

[80] 16 U.S. (3 Wheat.) 546 (1818).

[81] 335 F.3d 889 (9th Cir. 2003).

[82] *Id.* at 892.

[83] *Id.* at 893.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 14-CV-7667-PJW

CHRISTOPHER BATTERTON,

Plaintiff,

v.

THE DUTRA GROUP,

Defendant.

December 15, 2014

ORDER DENYING DEFENDANT'S MOTION TO STRIKE PUNITIVE DAMAGES FROM THE COMPLAINT OR IN THE ALTERNATIVE TO DISMISS FOR FAILURE TO STATE A CLAIM

I.

INTRODUCTION

Before the Court is Defendant The Dutra Group's motion to strike Plaintiff's punitive damages claim. Alternatively, Defendant moves to dismiss that claim for failure to state a claim upon which relief may be granted. For the following reasons, the motion is denied.

II.

STATEMENT OF FACTS

Plaintiff Christopher Batterton is a former employee of The Dutra Group. (First Amended Complaint ("FAC") at ¶ 1.) He worked as a deckhand and crew

member on a number of vessels that were owned and operated by Defendant. (FAC at ¶ 2.) In August 2014, he was working aboard the SCOW 3 near Newport Beach, California, when a hatchcover blew open as a result of too much pressure in a compartment below the hatch and crushed his left hand. (FAC at ¶ 5.) Plaintiff sustained serious injuries and believes that he will be permanently disabled as a result. (FAC at ¶ 11.)

Following the accident, Plaintiff brought this action for negligence, unseaworthiness, maintenance and cure, and unearned wages. He seeks general and punitive damages. (FAC at 7.) Defendant moves to dismiss Plaintiff's punitive damages claim under Federal Rule of Civil Procedure 12(b)(6) on the ground that, as a matter of law, punitive damages are not available in a maritime action. For the following reasons, the motion is denied.[1]

III.

ANALYSIS

A. Standard of Review

In ruling on a motion to dismiss, the Court accepts as true the factual allegations contained in the complaint and views all inferences in a light most favorable to the plaintiff. *See Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). Dismissal for failure

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[1] Defendant also argues that the punitive damages claim should be stricken under Federal Rule of Civil Procedure 12(f) on the ground that it is "redundant, immaterial, impertinent, or scandalous." (Motion at 4.) The Court finds that Rule 12(f) does not apply, *see Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, (9th Cir. 2010) (holding "Rule 12(f) does not authorize district courts to strike claims for damages on the ground that such claims are precluded as a matter of law"), and analyzes the motion under Rule 12(b)(6).

to state a claim is appropriate if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* Dismissal is appropriate only if there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

B. The Law of this Circuit Holds that Punitive Damages are Available in Unseaworthiness Claims

Defendant moves to dismiss Plaintiff's punitive damages claim, arguing that under "controlling, unequivocal, and settled legal authority ... punitive damages are *not* available for personal injury actions based on claims of unseaworthiness." (Motion at 3.) In support of its motion, it relies primarily on the Supreme Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and the Fifth Circuit's decision in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) (en banc). In *Miles*, the Supreme Court held that the family of a seaman who had died on a ship could not recover non-pecuniary damages for loss of society because such damages were barred by the Jones Act, which governed, and the family could not sidestep that bar by bringing a claim for unseaworthiness under general maritime law. In *McBride*, decided by an en banc panel of the Fifth Circuit in September of this year, the court held that punitive damages were barred in unseaworthiness actions under general maritime law.

Plaintiff contends that *Miles* was limited to wrongful death suits and does not bar punitive damages here. In support of his argument, he cites *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 419 (2009), wherein the Supreme Court held that punitive damages were

available in maintenance and cure actions because they were available before the Jones Act and the Jones Act did not purport to change that law. As to *McBride*, Plaintiff argues that it is not binding on this Court and that *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987) (overruled on other grounds), which is, specifically holds that punitive damages are available in unseaworthiness claims.

Having closely read all of these cases and a host of others on point, the Court is certain of one thing: the law on this issue is not unequivocal or settled as urged by Defendant. In fact, the Court would characterize the law as equivocal and unsettled. To begin with, the United States Supreme Court has never decided whether punitive damages are available in an unseaworthiness claim like the one at bar. And, though the Fifth Circuit took a stab at the issue in September, the majority garnered only eight of 15 votes. Thus, seven of the 15 appellate judges who decided this issue three months ago believed that punitive damages were available in unseaworthiness claims under general maritime law.

The Court then turns to the Ninth Circuit law. In *Evich*, decided in 1987, the Ninth Circuit made clear that punitive damages are available in unseaworthiness claims under general maritime law. *Evich*, 819 F.2d at 258. Interestingly, the Court relied on a Fifth Circuit case, *In re Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981), to reach this conclusion. In 1990, the Supreme Court decided *Miles*, holding that non-pecuniary damages were not available in wrongful death suits by family members because they were not available under the governing Jones Act and the family members were not allowed to sidestep this bar by suing under general maritime law. In the wake of *Miles* it was uncertain whether *Evich* was still good law. In 1994, in *Sutton v.*

Earles, 26 F.3d 903, 919-20 (9th Cir. 1994) and *Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 427 (9th Cir. 1994), the circuit explained that it was, holding that *Miles* only called into doubt *Evich*'s holdings as to survival actions asserted by seamen's estates in wrongful death suits. Nothing from the Ninth Circuit since then has suggested that the law is otherwise.

Thus, as the Court sees it, *Evich*'s holding that punitive damages are available in unseaworthiness claims under general maritime law has never been expressly or impliedly overruled. Nor is it clearly irreconcilable with *Miles* or any of the Supreme Court's other decisions since 1987. As such, it is still good law in this circuit. *See, e.g.*, *Wagner v. Kona Blue Water Farms, LLC*, No. 9-600 JMS/BMK, 2010 WL 3566731, at *6-7 (D. Hi. Sept. 13, 2010) (holding *Evich*'s holding that punitive damages are available in general maritime suit still good law in the Ninth Circuit despite *Miles*); *Rowe v. Hornblower Fleet*, No. C-11-4979 JCS, 2012 WL 5833541 (N.D. Cal. Nov. 16, 2012) (denying motion to dismiss punitive damages claim in unseaworthiness action as "[t]here are no provisions in the Jones Act that limit the right to seek punitive damages on a claim for unseaworthiness ... [and] *Evich* is not clearly irreconcilable with *Miles* and *Atlantic Sounding*."). For these reasons, Defendant's motion to dismiss Plaintiff's punitive damages claim is denied.

IT IS SO ORDERED.

DATED: December 15, 2014

/s/ Patrick J. Walsh
PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56775
D.C. No. 2:14-cv-07667-PJW
Central District of California, Los Angeles

CHRISTOPHER BATTERTON,
Plaintiff-Appellee,

v.

DUTRA GROUP,
Defendant-Appellant.

Filed May 2, 2018

ORDER

Before: THOMAS, Chief Judge, and KLEINFELD and NGUYEN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Chief Judge Thomas and Judge Nguyen have voted to deny the petition for rehearing en banc, and Judge Kleinfeld has recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 14-7667-PJW

CHRISTOPHER BATTERTON,

Plaintiff,

v.

THE DUTRA GROUP,

Defendant.

Filed: February 6, 2015

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO CERTIFY INTERLOCUTORY APPEAL AND STAY PROCEEDINGS

On January 5, 2015, Defendant The Dutra Group filed a motion to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and to stay proceedings in the district court pending resolution of the appeal in the Ninth Circuit. Defendant seeks to immediately appeal the Court's December 15, 2014 order denying its motion to dismiss Plaintiff's claim for punitive damages. Plaintiff opposes the motion. For the reasons discussed below, the motion is granted in part and denied in part.

I.

BACKGROUND

In August 2014, Plaintiff Christopher Batterton was injured while working aboard the SCOW 3 when a hatchcover blew open, crushing his hand. He sues the owner and operator of the vessel, The Dutra Group, for negligence, unseaworthiness, maintenance and cure, and unearned wages. He seeks both general and punitive damages.

Defendant does not believe that punitive damages are available in unseaworthiness actions and filed a motion asking the Court to strike the punitive damages claim from the suit. The Court denied the motion. Defendant now asks the Court to allow it to immediately appeal the Court's ruling to the Ninth Circuit Court of Appeals and to stay the action while that is being done.

II.

DISCUSSION

A. The Governing Standard

Under Title 28 U.S.C. § 1292(b), the Court may certify a nonfinal order for interlocutory appeal where the order (1) involves a controlling question of law, (2) as to which there is substantial ground for a difference of opinion, and (3) an immediate appeal might materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). Generally speaking, § 1292(b) certification is reserved for exceptional cases. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996) ("Routine resort to § 1292(b) requests would hardly comport with Congress' design to reserve interlocutory review for 'exceptional' cases while generally retaining for the federal courts a firm final judgment rule."). In evaluating

whether there is a "substantial ground for difference of opinion," the Court examines the extent to which the controlling law is unclear. *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). In general, this exists where the circuits are in conflict on an issue and the court of appeals for the circuit where the case was filed has not spoken on it. *Id.*

B. Defendant's Motion to Certify an Interlocutory Appeal

Defendant argues that certification is appropriate because the controlling legal question, i.e., whether punitive damages are recoverable in a maritime personal injury action based on unseaworthiness, is subject to substantial grounds for difference of opinion. It points out that just last year the Fifth Circuit decided in *McBride v. Estis Well Service*, 768 F.3d 382 (5th Cir. 2014), that punitive damages were not available in such an action, relying on the Supreme Court's 1990 decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). It further points out that, though the Ninth Circuit has not addressed the issue since the Supreme Court's decision in *Miles*, other circuits have and have determined that punitive damages are not available. Defendant also argues that the issue is a controlling question of law that can be answered independently of the facts of the case and that an interlocutory appeal would avoid protracted, expensive, and unnecessary litigation. For the following reasons, the Court agrees.

In 1987, the Ninth Circuit held that punitive damages are available in unseaworthiness claims. *See Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987) (overruled on other grounds). In *Miles*, decided three years later, the Supreme Court ruled that the family of a deceased seaman could not recover non-pecuniary damages in a

wrongful death action under the Jones Act, which barred such damages, nor could it sidestep that bar by bringing a general maritime claim for wrongful death resulting from unseaworthiness.

After *Miles*, lower courts across the country reached different conclusions as to whether punitive damages were still available in unseaworthiness claims. In 2009, the Supreme Court decided *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009), which many interpreted as a substantial narrowing of *Miles*. There, the Supreme Court held that, in a maintenance and cure action, punitive damages *were* allowed, noting that such damages were well established before the Jones Act was passed and that the Jones Act did not "eliminate pre-existing remedies available to seamen for the separate common-law cause of action based on [their] right to maintenance and cure." *Id.* at 415-16. Although that case involved maintenance and cure, not unseaworthiness, some lower courts interpreted *Atlantic Sounding* to mean that punitive damages were available in unseaworthiness actions. *See, e.g., Wagner v. Kona Blue Water Farms, LLC*, No. 9-600-JMS/BMK, 2010 WL 3566731 (D. Haw. Sept. 13, 2010) (holding punitive damages available in unseaworthiness claims and explaining *Evich* still good law).

By contrast, the Fifth Circuit ruled en banc in 2014 that, under *Miles*, punitive damages were barred in unseaworthiness actions under general maritime law. *McBride*, 768 F.3d 382. Of the 15 Fifth Circuit judges on the en banc panel, however, only eight of them supported that view, the other seven disagreed.

Given the foregoing, the Court finds that there is substantial ground for difference of opinion on the issue of whether punitive damages are available in unsea-

worthiness claims. *See Hart v. Bechtel Corp.*, 90 F.R.D. 104, 107 (D. Ariz. 1981) ("[G]iven the above-mentioned conflict between the Ninth Circuit and the Second and Fifth Circuits, this Court finds that there is substantial ground for difference of opinion"); *see also Klamath Irr. Dist. v. U.S.*, 69 Fed. Cl. 160, 163 (2005) (noting substantial ground for difference of opinion often "manifests itself as splits among the circuit courts, an intra-circuit conflict or a conflict between an earlier circuit precedent and a later Supreme Court case") (internal citations omitted).

Plaintiff contends that a circuit split is not enough to warrant an interlocutory appeal and that Defendant must show, instead, that there is a conflict between the district courts in the Ninth Circuit and/or the appellate courts in California. (Opposition at 5.) Even assuming that that were true, an interlocutory appeal would still be appropriate in this case because there is a split in this circuit among the district courts regarding this issue. *See, e.g., Complaint of Aleutian Enterprise, Ltd.*, 777 F. Supp. 793, 795-96 (W.D. Wash. 1991) ("The remedies provided by Congress under the Jones Act do not encompass punitive damages. The claimants ask this Court to supplant Congress' judgment in this regard by awarding punitive damages under general maritime law. That is not the proper function of this Court within our system of governance."); *Ortega v. Oceantrawl, Inc.*, 822 F. Supp. 621, 623 (D. Alaska 1992) ("At one time punitive damages were available for claims brought under the Jones Act and general maritime law. However, under a recent Supreme Court case, this view has changed."); *Jackson v. Unisea, Inc.*, 824 F. Supp. 895, 897 (D. Alaska 1992) ("It appears clear, however, that the [*Miles*] decision precludes the supplementation of a Jones Act claim with a punitive damage

recovery under general maritime law."); *La Voie v. Kualoa Ranch and Activity Club, Inc.*, 797 F. Supp. 827, 831 (D. Haw. 1992) ("This court finds that punitive damages are unavailable to plaintiff in the present case under the general maritime law of unseaworthiness based on *Miles*."). In light of the conflict both inside and outside the circuit and the fact that this issue concerns a controlling issue of law, the Court finds that an interlocutory appeal is warranted.

C. Defendant's Motion to Stay the Litigation Pending Appeal

Defendant has also requested that the Court stay the case under 28 U.S.C. § 1292(b) until the Ninth Circuit has resolved the punitive damages issue. For the following reasons, the Court grants Defendant's request in part and will stay the punitive damages issues until after the Ninth Circuit has spoken.

Generally speaking, a stay is appropriate where resolution of the issue on appeal would alter the direction of the proceedings and promote efficiency and economy of time for the Court and the parties. *Beaver v. Tarsadia Hotels*, 29 F. Supp. 3d 1323 (S.D. Cal. 2014); *Lakeland Village Homeowners Ass'n v. Great American Ins. Group*, 727 F. Supp. 2d 887, 897 (E.D. Cal. 2010).

The resolution of the punitive damages issues may alter the direction of this case. Further, it may prove to be more efficient and economical if the issue is decided before significant amounts of time and energy are spent addressing it and it is later determined that the Court was wrong. For that reason the Court concludes that the punitive damages issues should be stayed pending the appeal.

That being said, however, there is no reason to stay the rest of the case. The punitive damages do not impact whether Defendant was negligent or whether Plaintiff suffered injuries as a result of the accident. Further, delaying discovery on the other issues in the case until the issue of punitive damages is resolved could prove to be prejudicial. To begin with, witnesses' memories typically fade over time. The Court understands that the average period that a case is on appeal in the Ninth Circuit is about 24 months. It is not unreasonable to assume that the witnesses would have trouble recalling details of the incident twenty-four months from now that they may now remember. And, assuming the circuit agrees with the Court that punitive damages are available, it stands to reason that Defendant may want to appeal the Ninth Circuit's decision to the United States Supreme Court since obviously there would be a split among the circuits on the issue at that point. That would likely add another year or two to the appellate process. Plaintiff should not be forced to sit on his hands for two or three or four years while the punitive damages issue is resolved and then try to gather the evidence from witnesses who may not remember what happened. In addition, a delay will likely make it more difficult for Plaintiff and his counsel to find the witnesses two or three years from now as people tend to be mobile in this day and age.

Another consideration is the fact that the vessel is moveable. Defendant has no obligation to leave it here and, if Defendant elects to move it or sell it, Plaintiff will have a more difficult time gathering the evidence he needs from the vessel. The Court further notes that nature has a way of altering ships and over the course of the next two or three years it is possible that the ship could be altered by natural causes. It could also be

altered by man in that interim and there is always a risk that it could sink. Further, regardless of how the Ninth Circuit rules on the punitive damages issue, Plaintiff has a negligence claim that must be resolved in the district court. Thus, the case will not be stayed for issues not related to the punitive damages.

FOR THESE REASONS, IT IS HEREBY ORDERED that Defendant's request for certification for interlocutory appeal of the Court's December 15, 2014 Order Denying Motion to Dismiss is granted. Defendant's motion to stay the action is granted in part and denied in part. Discovery on Plaintiff's claim for punitive damages is stayed pending the Ninth Circuit's decision on the appeal. Plaintiff may, however, proceed on his other claims.[1]

DATE: 2/6/15

/s/ Patrick J. Walsh
PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

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[1] The Court envisions that the parties will be able to conduct wide-ranging discovery on liability and non-punitive damages over the next several months. Obviously, there may be some overlap in the discovery process. For instance, when Plaintiff's counsel deposes the management of the SCOW 3 about the accident, he may ask them about what happened and why. Assuming, hypothetically, that their response is, "We acted intentionally, deliberately, and recklessly to harm Plaintiff by failing to repair a clearly dangerous condition," Plaintiff's counsel will be able to follow up on that questioning and will not be foreclosed from inquiring about the managers' conduct even though it may go to punitive damages. Defendant will not, however, have to produce its financials and other documents relevant only to the issue of punitives until after the Ninth Circuit has ruled.

No. 18-266

In The
Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Petitioner advocates a *per se* rule that an injured seaman can never recover punitive damages under the general maritime law doctrine of unseaworthiness, no matter how egregious a defendant shipowner's fault may be. Even if a shipowner made a callous decision to send a doomed rust-bucket to sea in hopes of collecting on its insurance policy, petitioner's proposed rule would deny sailors who survive the inevitable sinking of the vessel their right under the general maritime law to seek punitive damages—even for their employer's deliberate wrong-doing.

As the court below recognized, this Court in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), has already announced the analytic framework that shows why petitioner must fail in its extraordinary effort to deny seamen asserting a well-established cause of action a remedy that has been available under the general maritime law for over two centuries. The *Townsend* Court also explained why *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the decision on which petitioner's argument entirely depends, cannot be read so broadly as petitioner contends. This Court should decline the invitation to revisit an issue that it has already resolved.

STATEMENT[1]

Respondent was injured in the course of his employment as a crew member of a dredge and two scows that petitioner owned and operated. While respondent was aboard the vessel *Scow 2*, petitioner was pumping pressurized air into the compartment below a hatch cover. When the air pressure rose to a dangerous level, the hatch cover blew open and crushed respondent's left hand. In the present action, he seeks maintenance and cure; damages for negligence under the Jones Act, 46 U.S.C. § 30104; and damages for the unseaworthiness of the vessel under general maritime law.[2]

Scow 2 was unseaworthy in multiple respects. The current petition centers on respondent's allegation that petitioner's reckless misconduct caused *Scow 2*'s unseaworthiness, thus permitting him to seek punitive damages. Petitioner moved to strike the punitive damages claim, arguing that *Miles* categorically precludes punitive damages in seamen's unseaworthiness actions. The district court denied that motion and certified its ruling for interlocutory appeal. The Ninth Circuit affirmed. The current petition followed.

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[1] In the present procedural posture, this Court must accept as true the facts as alleged by respondent. Because this is an interlocutory appeal, there has not yet been any judicial determination of the actual facts in the case.

[2] The "general maritime law" is judge-made law—a form of federal common law. *See generally, e.g., East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864-865 (1986). The general maritime law is a subset of federal maritime law, which also includes statutory law (such as the Jones Act, 46 U.S.C. § 30104).

REASONS FOR DENYING THE PETITION

I. Review is Unwarranted Because This Court in *Townsend* Has Already Provided Adequate Guidance on the Availability of Punitive Damages Under the General Maritime Law.

Petitioner asks this Court to provide guidance "on how to reconcile this Court's decisions in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009)." Pet. 2. But this Court has already done precisely that in *Townsend*. The *Townsend* employer, insisting that *Miles* had "limited recovery in maritime cases involving death or personal injury to the remedies available under the Jones Act and the Death on the High Seas Act [46 U.S.C. §§ 30301-08]," *Townsend*, 557 U.S. at 418, made almost exactly the same arguments that petitioner repeats here, including the argument that *Miles* precludes the availability of punitive damages in a personal-injury action under the general maritime law. This Court explicitly rejected that argument, explaining that "[the employer's] reading of *Miles* is far too broad." *Townsend*, 557 U.S. at 419. To be sure, the *Townsend* Court declared that "[t]he reasoning of *Miles* remains sound." *Id.* at 420. The "sound" reasoning, however, was the narrow reasoning that the *Miles* Court actually applied, not the "far too broad" reading of the decision that the *Townsend* employer advocated and that petitioner now repeats. As this Court explained:

> [A]pplication of [the *Miles*] principle here does not lead to the outcome suggested by [the

> employer]. . . . Unlike the situation presented in *Miles*, both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act. Also unlike the facts presented by *Miles*, the Jones Act does not address maintenance and cure or its remedy.

Id. (citation omitted). The *Townsend* Court accordingly established that *Miles* does not limit an injured seaman's available remedies when the relevant cause of action and remedy "were well established before the passage of the Jones Act," and the Jones Act does not address the cause of action or the remedy. Here it is beyond dispute that the cause of action (unseaworthiness) and the remedy (punitive damages) were both well-established before 1920, and that the Jones Act does not address either of them. There is no need for this Court to repeat its guidance and explain again how to reconcile *Miles* and *Townsend*.

Although most lower-court judges have correctly applied this Court's *Townsend* decision and recognized the limits on *Miles* as explained in *Townsend*, it is true that a plurality in the Fifth Circuit declined to follow *Townsend*'s guidance. *See infra* at 5-7. But this Court rarely exercises its certiorari power to correct the error of a single court of appeals, particularly the error in a plurality opinion. If the Court sees a need to reiterate its *Townsend* message, it would be more appropriate to wait for a case that repeats the Fifth Circuit plurality's

error. For the time being, it should permit respondent to proceed to the merits of his claims.

II. Respondent Overstates the Strength and Depth of the Conflict.

As petitioner recognizes, the conflict that it asks this Court to resolve "turns largely" on reconciling *Miles* and *Townsend*. Pet. 2. In the 9+ years since this Court decided *Townsend*, the question presented here has arisen in only three cases that reached the appellate courts. In each of those three cases, a majority of the appellate judges rejected the argument—which petitioner advances here—that *Miles* precludes the availability of punitive damages in "a personal injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel." Pet. i.

A. A majority of the Fifth Circuit judges in *McBride* rejected the *Miles*-based argument that petitioner advances here.

In *McBride* v. *Estis Well Service, L.L.C.*, 768 F.3d 382 (5th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2310 (2015), and *cert. denied after remand sub nom. Touchet* v. *Estis Well Service, L.L.C.*, 138 S. Ct. 644 (2018), the en banc Fifth Circuit affirmed a district court decision denying punitive damages in an unseaworthiness action on both a wrongful-death claim and personal-injury claims. But a majority of the judges on that court still rejected the argument that petitioner advances here. Judge Davis, writing for the seven-member plurality on the present question, read

Miles very broadly to apply not only to the loss-of-society damages that were at issue in *Miles* but also to punitive damages, *see* 768 F.3d at 386-389, 390-391, and to apply not only in the wrongful-death context that provided the analytic foundation for *Miles* but also in the conceptually distinct personal-injury context, *see id.* at 388-389. He essentially limited *Townsend* to its facts, arguing that this Court's most recent punitive damages decision governed only maintenance-and-cure cases, not other cases under the general maritime law. *See id.* at 389-390.[3]

The six dissenting judges in *McBride* rejected almost every step in the plurality's reasoning. They would have followed this Court's guidance in *Townsend* to hold that punitive damages are available in appropriate circumstances in unseaworthiness cases. *See id.* at 404-419 (Higginson, J., dissenting); *id.* at 419-424 (Graves, J., dissenting). In addition, two judges who joined Judge Davis to form a majority on the wrongful-death claim explicitly disagreed with his reasoning on the personal-injury claims. *See id.* at 401-402 (Haynes, J., concurring in the judgment).[4] Judge

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[3] For the most part, the plurality opinion in *McBride* resurrected the discredited reasoning of the Fifth Circuit's previous en banc decision in *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (en banc), *overruled*, *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009). The only relevant aspect of the *Guevara* reasoning that the *McBride* plurality did not follow was *Guevara*'s conclusion that the analysis for unseaworthiness and maintenance-and-cure actions was the same. *See* 59 F.3d at 1504.

[4] Petitioner concedes that "two of the concurring judges perceived a possible distinction between wrongful death cases and personal injury cases." Pet. 9 n.3. What Judge Haynes actually

Haynes, writing for herself and Judge Elrod, explained that the reasoning in *Miles* was based entirely on the fact that wrongful-death remedies did not exist at common law but were created by statute, and thus *Miles* limited those remedies to what the legislature had created. But the *Miles* reasoning simply did not apply to personal-injury remedies, which were common-law creations. In sum, eight judges in *McBride* rejected the seven-judge plurality's view that *Miles* compelled the denial of punitive damages in a personal-injury action such as the one here.

B. The Washington Supreme Court unanimously rejected the *Miles*-based argument that petitioner advances here.

Last year, the Washington Supreme Court faced this issue in *Tabingo v. American Triumph L.L.C.*, 188 Wash.2d 41, 391 P.3d 434 (2017), *cert. denied*, 138 S. Ct. 648 (2018). The nine justices on that court unanimously held that punitive damages are available in appropriate circumstances to a seaman injured as a result of the unseaworthiness of the vessel on which he was employed. The *Tabingo* court carefully applied the analytic framework that this Court announced in *Townsend*. Specifically, the Washington Supreme Court noted that *Townsend* had stated three central points:

> (1) "punitive damages have long been available at common law," (2) "the common-law

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said was "I disagree with [the plurality's] conclusion." 768 F.3d at 401 (Haynes, J., concurring in the judgment). She perceived much more than "a possible distinction." She saw that the plurality's analysis was inconsistent with this Court's holdings.

> tradition of punitive damages extends to maritime claims," and (3) "there is no evidence that claims for maintenance and cure were excluded from this general admiralty rule."

Id. at 48, 391 P.3d at 438 (¶ 16) (quoting *Townsend*, 557 U.S. at 414-415). The first two points apply equally in the unseaworthiness context, so "[t]he only question [was] whether there is reason to believe that unseaworthiness is excluded from this 'general admiralty rule.'" *Id.* at 49, 391 P.3d at 438 (¶ 17) (quoting *Townsend*, 557 U.S. at 415). Following this Court's decisions, the *Tabingo* court concluded that "it is not excluded." *Id.* Actions for unseaworthiness date back to the 1870s, and Congress intended the Jones Act "to protect seamen as wards of admiralty and to expand protections rather than limit them." *Id.* at 49, 391 P.3d at 439 (¶ 19) (citing *Townsend*, 557 U.S. at 417).

Finally, the *Tabingo* court recognized that *Townsend* had explained why *Miles* was not controlling in the present context:

> While the [*Townsend*] Court stated that the "reasoning of *Miles* remains sound," it also noted that the reasoning in *Miles* is not universally applicable. Because the cause of action in *Townsend* and the remedy sought were both "well established before the passage of the Jones Act," and because Congress had not spoken directly to the issue, punitive damages for maintenance and cure were appropriate. The *Miles* rationale did not apply. We use that same reasoning here. Claims for unseaworthiness predate the Jones Act and are not based

> on a statutory remedy. Further, as noted in *Townsend*, the Jones Act does not directly address damages for general maritime claims. There is no other indication that unseaworthiness should be excluded from the general maritime rule. Because of this, *Miles* does not restrict a general maritime claim for unseaworthiness.

Id. at 51, 391 P.3d at 439-440 (¶ 24) (citations omitted) (quoting and citing *Townsend*, 557 U.S. at 420-421).

In sum, the *Tabingo* court considered substantially the same argument that petitioner makes here and unanimously rejected it.

C. The court below unanimously rejected the *Miles*-based argument that petitioner advances here.

Most recently, the court below unanimously held that punitive damages are available in general maritime unseaworthiness cases when the defendant's conduct is sufficiently egregious. The court below conscientiously followed *Townsend*'s guidance to reach that conclusion:

> The [*Townsend*] Court noted that "[h]istorically, punitive damages have been available and awarded in general maritime actions." It found "that nothing in *Miles* or the Jones Act eliminates that availability." Unseaworthiness is a general maritime action long predating the Jones Act.

Pet. App. 12a (footnotes omitted) (quoting *Townsend*, 557 U.S. at 407).

The court below seriously considered petitioner's *Miles*-based argument, but recognized that *Miles* was distinguishable—particularly in light of this Court's clarification that *Miles* is not so broad as the defendant-employer in *Townsend* had argued. Miles was a wrongful-death case, and the result turned on the "restrictive recoveries permitted for wrongful death" at common law; those limitations "have no application to general maritime claims by living seamen for injuries to themselves." Pet. App. 14a. Moreover, "*Miles* did not address punitive damages," *id.* at 13a, and "it is not apparent why barring damages for loss of society should also bar punitive damages," *id.* at 10a.

The court below was bound by its prior decision in *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987) ("Punitive damages are available under general maritime law for claims of unseaworthiness."), which was not fundamentally inconsistent with *Miles*, but "under *Townsend*" the court "would reach the same conclusion *Evich* did, even if [it] were not bound by *Evich*." Pet. App. 15a.

* * *

Petitioner bases its argument for certiorari on a very weak conflict. It concedes that the issue is how to reconcile this Court's decisions in *Miles* and *Townsend*, but a majority of the judges in every appellate court to address that issue in the present context has explicitly rejected petitioner's argument. The Washington Supreme Court and the court below rejected it unanimously. The en banc Fifth Circuit rejected petitioner's

argument by a fractured 8-7 vote in which two of the eight judges concurred in the plurality's judgment. Petitioner does not present a strong or deep conflict.

III. Review in This Case Would Be Premature.

Even if this Court might be inclined once again to address the availability of punitive damages under the general maritime law, in answering the question presented here it would benefit from further percolation of the issue in the lower courts.

A. Few lower courts have addressed the question presented in this case, and no lower court has addressed the availability of punitive damages under the Jones Act in light of this Court's guidance in *Townsend*.

As noted above (*see supra* at 5-11), only three appellate courts have addressed the availability of punitive damages in unseaworthiness cases in light of this Court's guidance in *Townsend*. In each of those three cases, a majority of the judges—following *Townsend*—rejected the argument that petitioner makes here. That alone suggests that further review in this case is unwarranted, but petitioner faces an even more fundamental problem.

This Court could *affirm* the decision below without deciding whether punitive damages are available under the Jones Act. As explained below, *see infra* at 15-19, the general maritime law permits an award of punitive damages in an unseaworthiness case whether or not they are also available under the Jones Act. The

analysis required to affirm would be much the same as that employed by the *Townsend* Court, which held that the general maritime law permits an award of punitive damages in a maintenance-and-cure case whether or not they are also available under the Jones Act. The *Townsend* Court accordingly flagged the availability of punitive damages under the Jones Act as an open question that did not then need to be resolved. *See Townsend*, 557 U.S. at 424 n.12. The three-judge panel in *McBride* did the same thing, holding that the general maritime law permits an award of punitive damages in an unseaworthiness case whether or not they are also available under the Jones Act and thus declining to address the Jones Act question. *See McBride v. Estis Well Service, L.L.C.*, 731 F.3d 505, 518 n.16 (5th Cir. 2013) (superseded on rehearing en banc).

In contrast, this Court could not *reverse* the decision below unless it addresses that open question and concludes that punitive damages are unavailable under the Jones Act. Petitioner argues on the merits that *Miles* forecloses the availability of any remedy under the general maritime law's unseaworthiness doctrine that is not available under the Jones Act. *See, e.g.*, Pet. 12. In essence, petitioner argues that *Miles* "require[s] the narrowing of available damages to the lowest common denominator approved by Congress" in the Jones Act. *Cf. Townsend*, 557 U.S. at 424. For that *Miles*-based argument to succeed in foreclosing the availability of punitive damages here, however, petitioner must prove that punitive damages are not available under the Jones Act. In other words, the Court would need

to resolve the question that it left open in *Townsend*. *See* 557 U.S. at 424 n.12. In addressing that question, this Court would undoubtedly benefit from the well-considered views of the lower courts. But no lower court has yet discussed that issue in light of this Court's guidance in *Townsend*.

Courts holding that the general maritime law permits an award of punitive damages in an unseaworthiness case whether or not they are available under the Jones Act, such as the *Tubingo* court, had no need to discuss their availability under the Jones Act (just as this Court had no need to address the issue in *Townsend*). The court below had an additional reason why it was unnecessary to address the issue. In the Ninth Circuit, binding circuit precedent predating both *Miles* and *Townsend* holds that punitive damages are unavailable under the Jones Act. *See Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-561 (9th Cir. 1984). And because the court below upheld the availability of punitive damages in unseaworthiness actions, notwithstanding their unavailability under the Jones Act, the panel had no need to consider whether *Kopczynski* remains valid in light of *Townsend*. Remarkably, the Fifth Circuit in *McBride* also failed to discuss the issue, even though the en banc court needed to decide that issue to reach its desired conclusion. The leading opinion simply asserts that punitive damages are unavailable under the Jones Act, citing pre-*Townsend* cases from other circuits with no independent analysis. *See McBride*, 768 F.3d at 390-391.

In sum, if this Court wishes fully to consider the arguments that might be relevant to its decision in this case, it would benefit from further percolation on issues that the lower courts have not addressed in light of *Townsend*. Until the lower courts have considered how the *Townsend* analysis affects prior decisions regarding the availability of punitive damages under the Jones Act, review by this Court would be premature.

B. This Court's resolution of the question presented may be irrelevant to the ultimate resolution of this case because the jury may decide not to award punitive damages.

Although this Court has jurisdiction under 28 U.S.C. § 1254(1) to review an interlocutory decision of a federal court of appeals, the Court's preference for reviewing final judgments is well-recognized and well-established. *See, e.g.*, STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 282-283 (10th ed. 2013) (collecting cases). That preference also makes sense. If a case is allowed to proceed to final judgment, subsequent developments may moot the question presented and make this Court's intervention unnecessary. In the present case, for example, respondent might not recover punitive damages in the district court, which would make the question presented here entirely academic. It is also noteworthy that petitioner would not suffer any substantial harm in waiting. The case would need to be tried on respondent's substantive claims in any event. And if respondent does recover punitive damages in the district court, petitioner would still be

entitled to appeal the decision, and to seek certiorari in this Court if the Ninth Circuit affirms the award. *See id.* at 285-286 (collecting cases). In the interests of judicial economy, certiorari should therefore be denied on this interlocutory appeal.

IV. The Court Below Correctly Held that Punitive Damages Are Available in General Maritime Law Actions, Including Actions for Breach of the Warranty of Seaworthiness.

This Court in *Townsend* established the appropriate framework to answer the question presented here. Whether an injured seaman can seek punitive damages for a shipowner's egregious fault in failing to provide a seaworthy vessel on which to work turns on (1) whether the cause of action (unseaworthiness) and (2) the remedy (punitive damages) preexisted the Jones Act, and (3) whether the Jones Act precludes the action or the remedy. *Townsend*, 557 U.S. at 420-421; *see also id.* at 414-415, 424.

On the first requirement, an injured seaman had a cause of action for unseaworthiness long before Congress passed the Jones Act in 1920. Even if the no-fault aspects of the unseaworthiness action were not widely recognized until the 1940s,[8] *see, e.g.*, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95 (1946); *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 100 (1944); *cf.* Pet. 19,

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[8] In fact, this Court first recognized no-fault liability for unseaworthiness in *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259-260 (1922), which applied the pre-Jones Act general maritime law as it existed in 1917 (when the accident at issue occurred).

it is beyond dispute that by the late nineteenth century an injured seaman had a cause of action for unseaworthiness at least when the shipowner was negligent, and this Court explicitly recognized that cause of action in *The Osceola*, 189 U.S. 158, 175 (1903). The extent to which this Court expanded the scope of the unseaworthiness remedy in the 1940s is irrelevant in the present context, for it is undisputed that an injured seaman cannot seek punitive damages unless the defendant's conduct is more egregious than simple negligence. (In *Townsend*, this Court suggested that the prerequisite for punitive damages was "wanton, willful, or outrageous conduct." *Townsend*, 557 U.S. at 409.) In any unseaworthiness case in which punitive damages could possibly be awarded, the injured seaman would have had an action for unseaworthiness in the nineteenth century.

This Court resolved the second requirement in *Townsend*, when it held that "the remedy (punitive damages) [was] well established before the passage of the Jones Act." 557 U.S. at 420. Furthermore, *Townsend* puts the burden on petitioner to "identify any cases establishing that [punitive] damages were historically unavailable for breach" of the relevant duty, *id.* at 418, or to "explain why [relevant] actions should be excepted from [the] general rule," *id.* at 414 n.4. Petitioner cannot carry its burden because the evidence points to the availability of punitive damages in pre-Jones Act unseaworthiness cases.[6]

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[6] While none of the pre-Jones Act cases are models of doctrinal clarity, at least three awarded punitive damages for willful

This Court also resolved the third requirement in *Townsend*, when it held that the Jones Act did not eliminate pre-existing remedies available to seamen because "Congress was envisioning the continued availability of [the] common-law causes of action" that the *Osceola* Court had recognized. *Id.* at 416; *see also id.* at 417 ("[T]he Jones Act . . . 'was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it.'") (quoting *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936)).

Petitioner's reliance on *Miles* is unjustified. *Miles* held simply that this Court should not give seamen a more expansive remedy on a cause of action than Congress had authorized in an analogous statute when that cause of action did not exist before Congress passed the statute. Because the *Miles* plaintiff was asserting a wrongful-death claim, and maritime law did not recognize a cause of action for wrongful death until Congress created it in 1920, she should not recover more under the general maritime law than she could under the statute. And since loss-of-society damages

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unseaworthiness. *See The Rolph*, 293 F. 269 (N.D. Cal. 1923) (applying pre-Jones Act general maritime law), *aff'd*, 299 F. 52 (9th Cir. 1924); *The City of Carlisle*, 39 F. 807 (D. Ore. 1889); *The Troop*, 118 F. 769 (D. Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904). In *Townsend*, this Court recognized *The City of Carlisle* and *The Troop* as examples of cases in which punitive damages were awarded in pre-Jones Act maintenance-and-cure cases, *see* 557 U.S. at 414, but they were also unseaworthiness cases. In each of them, the vessel was unseaworthy for the same reason that the vessel in *Miles* was unseaworthy.

were unavailable under the relevant statute, she could not recover them under the general maritime law. *Miles* said nothing about non-fatal personal injury claims and it said nothing about punitive damages.

Petitioner's "far too broad" reading of *Miles* not only expands the case beyond what its reasoning can support, but it was also "directly rejected by this Court in *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001)," *Townsend*, 557 U.S. at 421, and again in *Townsend*, *see id.* at 419 (The "reading of *Miles* [that petitioner advocates here] is far too broad."). Petitioner repeatedly stresses that "[t]he reasoning of *Miles* remains sound," *see* Pet. 3, 10, 17, but no matter how often that phrase is repeated it is still the *Miles* Court's limited reasoning that is "sound," not petitioner's expansive reasoning that this Court rejected in *Townsend*.

Finally, petitioner's attempt to limit *Townsend* to its facts is unjustified. Although this Court was addressing a claim for punitive damages in the context of a maintenance-and-cure claim, it spoke broadly of actions under the general maritime law (as opposed to statutory actions), a category that includes both unseaworthiness and maintenance-and-cure actions. *See, e.g.*, *Townsend*, 557 U.S. at 411 (referring generally "to claims arising under federal maritime law"); *id.* at 420 (establishing a framework for decision in which the relevant issue is whether "the general maritime cause of action," of which "maintenance and cure" is merely one example, was "well established before the passage of the Jones Act"); *id.* at 424 (recognizing that "punitive

damages have long been an accepted remedy under general maritime law, and . . . nothing in the Jones Act altered this understanding"). Unlike *Miles*, the *Townsend* decision directly addresses the issue in this case—the availability of punitive damages. And unlike *Miles*, the reasoning in *Townsend* does not depend on the historical limitation of wrongful-death actions.

V. Petitioner Exaggerates the Importance of the Question Presented.

Petitioner presents a parade of horribles that would ensue if this Court does not reverse the judgment below—the collapse of the economy, the destruction of the environment, and the undermining of national security. *See* Pet. 25. Even if those claims were not self-evidently exaggerated, the evidence provided by decades of actual experience rebuts petitioner's claims.

Until some lower courts adopted a "far too broad" interpretation of this Court's decision in *Miles*, no lower court had held that punitive damages were unavailable in an action to recover for personal injuries suffered as a result of a breach of the general maritime law warranty of a seaworthy vessel. On the contrary, the pre-*Miles* decisions consistently held that punitive damages were available in an appropriate unseaworthiness case. *See, e.g.*, *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987) ("Punitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship."); *Evich v. Morris*, 819 F.2d

256, 258 (9th Cir. 1987) ("Punitive damages are available under general maritime law for claims of unseaworthiness."); *In re Merry Shipping, Inc.*, 650 F.2d 622, 623 (5th Cir. Unit B July 1981) ("[P]unitive damages may be recovered under general maritime law upon a showing of willful and wanton misconduct by the shipowner in the creation or maintenance of unseaworthy conditions."); *id.* at 626 ("[P]unitive damages may be recovered under general maritime law upon a showing of willful and wanton misconduct by the shipowner."); *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972) (dicta) (Punitive damages are permitted in an unseaworthiness case if "the defendant was guilty of gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct."). In the Ninth and Eleventh Circuits, those decisions have not been overruled, and the courts have continued to apply them. *See, e.g.*, *Wolf v. McCulley Marine Services, Inc.*, 2013 AMC 1768, 1776 (M.D. Fla. 2012) ("[P]unitive damages may be awarded in an unseaworthiness action when the plaintiff can prove 'wanton, willful, or outrageous conduct.'") (footnote omitted).

Indeed in *Miles* itself, the Fifth Circuit—in the decision that this Court affirmed—explicitly recognized that "[p]unitive damages are recoverable under the general maritime law 'upon a showing of willful and wanton misconduct by the shipowner' in failing to provide a seaworthy vessel," even though it held that loss-of-society damages were not recoverable. *Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989) (quoting

Merry Shipping, 650 F.2d at 626) (footnote omitted), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

During the decades in which punitive damages were unquestionably available in unseaworthiness actions (a period extending to the present time in some circuits), no evidence suggests that they undermined national security, destroyed the environment, or sabotaged the economy. On the contrary, they provided an incentive for vessel owners to fulfill their general maritime law duty to furnish a seaworthy vessel so that their employees would have a safe place to work.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 18-266

IN THE

Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Fifth and Ninth Circuits, which hear most maritime injury cases in the federal courts, have reached directly opposite conclusions as to whether punitive damages are available in actions for unseaworthiness under general maritime law. That question is important, given the constitutional mandate to maintain uniform maritime law and the potentially serious consequences of allowing punitive damages for unseaworthiness. Respondent's opposition offers no persuasive reason why this Court should deny review.

ARGUMENT

I. THERE IS A REAL AND DURABLE SPLIT BETWEEN THE MOST IMPORTANT LOWER ADMIRALTY COURTS

The Ninth Circuit held that punitive damages are available in unseaworthiness actions, the Fifth Circuit held the opposite, and this Court should resolve that disagreement. In fact, shortly after the court of appeals issued its decision here, respondent's counsel told the media that "[t]his decision creates a split between the Ninth and Fifth Circuits," and acknowledged the likelihood that this Court would grant review to resolve the split. Brown, Am. Ass'n for Justice, *Ninth Circuit Rules Punitive Damages Available for Unseaworthiness Claims* (Feb. 22, 2018).[1]

Respondent's strained effort to reinterpret the Fifth Circuit's decisions falls short. Respondent claims (at 5) that "a majority" of the en banc Fifth Circuit in *McBride* v. *Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014), "rejected the argument [that] petitioner advances here." There are several problems with that contention. First, a later Fifth Circuit panel—which respondent ignores—stated unqualifiedly that its "prior en banc decision ... hold[s] that punitive damages are not available ... on [plaintiffs'] Jones Act and general maritime law claims." *McBride* v. *Estis Well Serv., LLC*, 853 F.3d 777, 780 n.1 (5th Cir. 2017), *cert. denied sub nom. Touchet* v. *Estis Well Serv., LLC*, 138 S. Ct. 644 (2018). Second, the Ninth Circuit acknowledged in the decision below that the Fifth Circuit's decision in "*McBride* ... *holds* that punitive damages ... may not be recovered under the Jones Act or under the general

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[1] https://www.justice.org/news-and-research/law-reporter-and-trial-news/february-22-2018-trial-news.

maritime law," referring to unseaworthiness actions. Pet. App. 6a (punctuation modified; emphasis added).

Focusing on the precise reasoning of the various opinions in *McBride*, as respondent does, does not diminish the split or the need for this Court's review. The Fifth Circuit's controlling rule is still the opposite of the Ninth Circuit's. The holding of the Fifth Circuit is not determined by cobbling together an apparent majority from concurring and dissenting opinions. That would yield the absurd result that the court's holding contradicted its judgment in the same case. *Cf. Gibson* v. *American Cyanamid Co.*, 760 F.3d 600, 620-621 (7th Cir. 2014) ("dissenting opinions cannot be counted under *Marks* to create binding precedent"); *King* v. *Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc) ("we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority").

In any event, contrary to respondent's suggestion (at 6-7), a majority of the en banc Fifth Circuit explicitly rejected the position that was adopted by the Ninth Circuit. The lead opinion, joined by seven judges, concluded that, "[b]ased on *Miles* [v. *Apex Marine Corp.*, 498 U.S. 19 (1990),] and other Supreme Court and circuit authority, ... [p]unitive damages are not recoverable" in unseaworthiness (and Jones Act) actions, whether the seaman was killed or injured. *McBride*, 768 F.3d at 391. Tracking *Miles*, the lead opinion explained that "Congress ha[d] struck the balance for us in determining the scope of damages"—with respect to "personal injury actions as well as ... wrongful death action[s]." *Id.* at 388-389 (punctuation modified).

According to respondent (at 6), two concurring judges "explicitly disagreed with [the lead opinion's] reasoning on the personal-injury claims." That distorts

those judges' position, which was not markedly different from the lead opinion's analysis. They explicitly "concur[red] in the reasoning expressed in the majority opinion with respect to the wrongful death ... claims." 768 F.3d at 401. Although they did not agree that *Miles* "dictate[d] the outcome" for personal-injury claims—because, they explained, *Miles* involved only a wrongful-death claim (*id.* at 401-402)—they did not "follow[*Atlantic Sounding Co.* v.] *Townsend*," 557 U.S. 404 (2009), or otherwise agree with the view taken by the dissent there (or respondent and the Ninth Circuit here), as respondent claims (at 9). To the contrary, they explicitly stated that they "cannot join the dissenting opinions with respect to the surviving seamen." 768 F.3d at 402 (Haynes, J., concurring). They specifically *rejected* the dissent's position, which—like that of the Ninth Circuit and respondent here—rested heavily on *Townsend*; as they explained, *Townsend* "addressed only maintenance and cure" and therefore was not controlling in unseaworthiness cases. *Id.* at 404 (Haynes, J., concurring); *see* Pet. 17-20.

There can be no doubt that the Fifth and Ninth Circuits disagree on the question presented here. Had this case been brought in the Fifth Circuit, respondent's claim for punitive damages would have been dismissed. Nothing further is needed to establish a circuit conflict.

II. This Case Is An Appropriate Vehicle To Resolve This Important Issue

The divisions among lower courts—between the Ninth and Fifth Circuits, and also between the Washington Supreme Court and other federal and state appellate courts (*see* Pet. 8-9)—is important and deserves this Court's prompt attention.

A. The Constitution "mandate[s]" nationally "uniform" maritime law. *Miles*, 498 U.S. at 27; Pet. 26; Br. of At-Sea Processors Ass'n et al. ("ASPA Br.") 5. As long as the current division persists, vessel owners and operators will face uncertainty about their potential liability. Pet. 11 & n.5, 26; ASPA Br. 6. The inconsistency also provides vessel owners that operate primarily off the Gulf Coast an unwarranted financial advantage over those that operate primarily off the Pacific Coast, and gives plaintiffs an incentive to engage in forum shopping. No policy justification supports such a result.

Further, the substance of the ruling below is deeply problematic. The potential for massive punitive damages awards will likely increase operating costs for maritime owners and employers, to the detriment of our national economy, environment, and security. Pet. 23-26; ASPA Br. 3-4, 7-10 (allowing punitive damages for unseaworthiness "will markedly increase maritime operators' litigation costs, result in higher prices for consumers, make the U.S. maritime industry less competitive with industries in countries whose law precludes punitive damages").

Respondent does not deny the constitutional imperative to eliminate the inconsistency in maritime law, but does deny that allowing punitive damages in unseaworthiness cases threatens serious harms. Respondent questions (at 19, 21) whether there is support for the notion that recognition of punitive damages for unseaworthiness would cause "the collapse of the economy, the destruction of the environment, and the undermining of national security." But petitioner has not made, and need not make, such dire claims. Rather, petitioner has noted—as many courts and commentators have observed—that punitive damages, especially in

such an important sector of the economy, can have adverse consequences and do raise serious concerns. *See* Pet. 23-26.

Moreover, actual experience is far less informative than respondent asserts, because there has never been a sustained period when punitive damages were available in unseaworthiness actions. As respondent concedes (at 20), the discussion of punitive damages in *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1972), was "dicta." A few cases in the 1980s allowed punitive damages for unseaworthiness claims, as petitioner acknowledged. *See* Pet. 16 n.10. But that regime was fleeting, because it was widely understood that in 1990 *Miles* "effectively overruled" those cases and foreclosed punitive damages for unseaworthiness. *Guevara* v. *Maritime Overseas Corp.*, 59 F.3d 1496, 1507 (5th Cir. 1995), *abrogated by Townsend on other grounds*, 557 U.S. 504; *see* Pet. 8-9 (collecting post-*Miles* cases rejecting availability of punitive damages).

B. According to respondent (at 11-14), review of the question presented is "premature" because (a) the Court could not reverse the Ninth Circuit's decision on unseaworthiness unless it also addressed whether punitive damages are available for Jones Act negligence claims, and (b) the Court would "benefit from further percolation on [the Jones Act] issue ... in light of *Townsend*." That argument lacks merit.

There is no serious doubt that punitive damages are unavailable in negligence actions under the Jones Act. As petitioner has detailed (Pet. 13-16), for more than a century this Court has consistently recognized that the Jones Act and the statute it incorporates, the Federal Employers Liability Act ("FELA"), restrict recovery to *compensatory* damages and thus disallow

punitive damages. *See, e.g., Pacific S.S. Co.* v. *Peterson*, 278 U.S. 130, 138 (1928) (Jones Act and unseaworthiness provide "right to recover compensatory damages"); *Seaboard Air Line Ry.* v. *Koennecke*, 239 U.S. 352, 354 (1915) (reasoning that claim for punitive damages must have arisen under state law because FELA did not allow punitive damages). Respondent ignores those precedents, but the lower courts have not, consistently concluding that punitive damages are unavailable under the Jones Act. As the en banc Fifth Circuit observed, "no cases have awarded punitive damages" under the Jones Act. *McBride*, 768 F.3d at 388. Indeed, respondent must have recognized as much, for his complaint did not request punitive damages under the Jones Act—which it surely would have done had respondent thought the question remained open.

Respondent's assertion (at 12-13) that *Townsend* warrants reconsideration of this settled view is baseless. In *Townsend*, the Court neither provided "guidance" on this issue nor recognized it as an "open question." Br. in Opp. 12-13. All the Court said was that it would "not address the dissent's argument" that punitive damages are unavailable in Jones Act negligence actions. 557 U.S. at 424 n.12. Respondent points to nothing in *Townsend* suggesting that the settled view is questionable.

Moreover, it is not correct that the Court could reverse the decision below only if punitive damages are unavailable under the Jones Act. As noted in the petition (Pet. 20 n.11), and as seven Fifth Circuit judges have concluded, even under the *Townsend* framework punitive damages would be unavailable, because there is no evidence that such damages were available for unseaworthiness claims before the Jones Act. *McBride*,

768 F.3d at 394-399 (Clement, J., concurring); *id.* at 403 (Haynes, J., concurring); *see infra* III.C.

C. Respondent argues (at 14) that the Court should deny the petition because "the jury may decide not to award punitive damages." That is just another way of saying that this petition arises in an interlocutory posture, but that is not a good reason to deny the petition. Indeed, this Court heard *Townsend* in the same interlocutory posture. 557 U.S. at 408; Pet. 27. The Ninth Circuit's decision squarely announces a rule of law that will govern all future cases arising in that circuit. That ruling substantially increases the potential liability faced by maritime owners and operators and will amplify plaintiffs' ability to pressure owners and operators to settle meritless unseaworthiness claims. There is no reason for this Court to defer reviewing the Ninth Circuit's decision until after those adverse consequences have come to pass.

III. The Decision Below Is Incorrect

Respondent is fond of saying (at 3, 18-19) that petitioner adopts the same "far too broad" reading of *Miles* that the Court rejected in *Townsend*. Respondent is mistaken. *Townsend* rejected the argument that *Miles* had defined the limits of recovery in *all* types of actions under general maritime law. *See* 557 U.S. at 418-419. Petitioner makes no such argument; rather, petitioner has pointed to *Miles*'s emphasis on the close relationship between *unseaworthiness* actions under general maritime law and negligence actions under the Jones Act. Respondent's failure to acknowledge that aspect of *Miles* is a fundamental flaw in his position.

A. Just a few years after the Jones Act's enactment, this Court explained that, unlike maintenance

and cure, Jones Act negligence is "an alternative of ... unseaworthiness." *Peterson*, 278 U.S. at 138. Thus, whether a claim invokes negligence or unseaworthiness (or both), "there is but a single wrongful invasion." *Id.* The Court has reaffirmed that unseaworthiness and Jones Act negligence are alternatives to each other but not to maintenance and cure. *See, e.g.*, *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 225 (1958). Those relationships explain the differing outcomes in *Miles* and *Townsend*, and also explain why this case falls under *Miles*.

Because unseaworthiness and Jones Act negligence are alternatives, they have been understood to have a similar remedial scope. As the Court put it long ago, unseaworthiness and Jones Act negligence embody a single "right to recover compensatory damages" and thus "entitle[the plaintiff] to but one indemnity by way of compensatory damages." *Peterson*, 278 U.S. at 138 (emphasis added). Or, as the Court put it in *Townsend*, unseaworthiness is "an alternative of the right to recover compensatory damages under the Jones Act," such that "the seaman may have ... one of the ... two." 557 U.S. at 423-424 (punctuation altered).

The Court's post-Jones Act "transform[ation of] the warranty of seaworthiness into a strict liability obligation" added an important constitutional dimension to the relationship between unseaworthiness and the Jones Act. *Miles*, 498 U.S. at 25-26.[2] Given that "revolution," this Court explained, "[i]t would be inconsistent with [the Court's] place in the constitutional scheme to

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[2] "The revolution in the law [of unseaworthiness] began with *Mahnich* v. *Southern S.S. Co.*," 321 U.S. 96 (1944). *Miles*, 498 U.S. at 25 (punctuation altered); *see Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 398 (1970).

sanction more expansive remedies in a judicially created cause of action in which liability is without fault"—that is, unseaworthiness as redefined after the Jones Act—than Congress had sanctioned for negligence under the Jones Act. *Miles*, 498 U.S. at 25, 32-33 (punctuation altered). Consequently, any "limit" on damages that Congress placed on negligence under Jones Act "forecloses more expansive remedies in a general maritime action founded on strict liability," *i.e.*, post-Jones Act unseaworthiness. *Id.* at 31, 36.

As the Court later explained in *Townsend*, *Miles*'s analysis does not govern the proper remedy for maintenance and cure because "the maintenance and cure right is in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under the Jones Act." *Townsend*, 557 U.S. at 423-424 (punctuation altered). Rather, "the seaman may have maintenance and cure *and*" a recovery under (either) Jones Act negligence or unseaworthiness. *Id.* Consequently, the Court did not overstep its constitutional role by defining the remedial scope of maintenance and cure beyond the remedial scope of the Jones Act. *See id.* at 420-424.

B. Respondent acknowledges (at 3) this Court's statement in *Townsend* that "[t]he reasoning of *Miles* remains sound," 557 U.S. at 420, but he then ignores the central role that the relationship between the Jones Act and unseaworthiness played in that reasoning. In respondent's view (at 17), the result in *Miles* rested solely on the distinct historical evolution of the remedy for wrongful death. That is a serious misreading of *Miles*. Although the Court first decided whether to recognize a claim for wrongful death based on unseaworthiness, 498 U.S. at 30-31, the Court's ensuing analysis of the remedial scope of the claim—as the passages

just quoted show—turned on the relationship between unseaworthiness and Jones Act negligence.

And the Court's reasoning in *Miles* is directly relevant to punitive damages for unseaworthiness whether the seaman was injured or killed. Either way, the unseaworthiness action is a post-Jones Act creation of the courts rather than Congress, and the scope of recovery should not depend on the happenstance of whether the seaman dies from the injury—any more than it should depend on which alternative cause of action the plaintiff invokes. The Court in *Miles* did not fail to recognize that its decision would apply to personal injury cases as well as wrongful death cases; the Court made clear that it would "not create, under our admiralty powers, a remedy ... that goes well beyond the limits of Congress' ordered system of recovery for seamen's *injury* and death." 498 U.S. at 36 (emphasis added).

C. Even if Congress had not spoken to the scope of recovery and so the *Townsend* framework applied, the decision below would be wrong. The dispositive question in that analysis would be whether punitive damages were historically available for unseaworthiness claims, at least before the Jones Act was enacted. *See* 557 U.S. at 414-415. There is no evidence that they were. As Judges Clement and Haynes recognized in *McBride*, silence here speaks loudly, for the historical record yields a total absence of cases recognizing punitive damages in unseaworthiness claims. 768 F.3d at 394-399 (Clement, J., concurring); *id.* at 403 (Haynes, J., concurring).

The cases respondent cites (at 17 n.6) do not show that punitive damages were available for unseaworthiness before the Jones Act. *The Rolph* was decided after the Jones Act and gave no indication that it was ap-

plying a pre-Jones Act understanding of unseaworthiness that permitted punitive damages. 293 F. 269 (N.D. Cal. 1923), *aff'd*, 299 F. 52 (9th Cir. 1924). In fact, it consistently described the damages as "compensation." 293 F. at 271-272; *see Townsend*, 557 U.S. at 431 (Alito, J., dissenting); *McBride*, 768 F.3d at 395-397 (Clement, J., concurring). The punitive-damages award in *The City of Carlisle* concerned maintenance and cure. 39 F. 807, 816-817 (D. Or. 1889). And in *The Troop*, the only damages awarded were based on maintenance and cure—and were only compensatory. 118 F. 769, 770-773 (D. Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904); *see McBride*, 768 F.3d at 395 n.16 (Clement, J., concurring). Neither history nor logic therefore supports punitive damages in unseaworthiness cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 18-266

In The
Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF ATLANTIC SOUNDING COMPANY, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Atlantic Sounding Co., Inc. employs seamen in its marine operations across the United States and has a direct interest in the remedies available to those workers under the general maritime law, as exemplified in the decision of this Court in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), which was relied upon by the Ninth Circuit below to hold that punitive damages are available in seamen's unseaworthiness actions. *Batterton v. Dutra Group*, 880 F.3d 1089, 1091-96 (9th Cir. 2018).

Atlantic Sounding has engaged the services of Kenneth G. Engerrand, who has taught admiralty law for more than 40 years and published numerous articles on the roles of Congress and the Courts on the formation of principles of general maritime law, to address in detail the critical issue in this case—the relationship between the Jones Act and the principles of judicially declared maritime law.[1]

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[1] In accordance with Rule 37.6., counsel for Amicus Curiae certifies the following:

(A) The undersigned authored this brief in whole, and no counsel for any party authored this brief in whole or in part.

(B) No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The general maritime law has been dominated by civil codes and legislation for thousands of years, and that is exemplified in the United States where Congress has exercised its paramount authority over seamen's remedies since the first Congress. Unlike its decision to retain the seamen's contract-based remedy of maintenance and cure, Congress has modified seamen's tort remedies for injury and death with the intent to occupy the field. Having exercised its superior authority over seamen's tort claims with respect to the specific issue in this case—damages in the seamen's tort liability cause of action—Congress has left this Court with no role in our constitutional scheme to supplement the settled plan of rights and responsibilities established by Congress.

ARGUMENT AND AUTHORITIES

I. The Roles of Congress and the Courts in Formulating Maritime Remedies

The issue presented to this Court involves the roles of Congress and the courts in formulating

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(C) No person, other than the Amicus Curiae, contributed money that was intended to fund preparing or submitting this brief.

The written consent of all parties to the filing of this brief has been provided as both Petitioner and Respondent have filed blanket consents to the filing of amicus curiae briefs in support of either or neither party.

maritime remedies, particularly the authority of judges to fashion elements of recovery in an area where Congress has repeatedly legislated and has occupied the field. This issue is not new to admiralty, nor is it a creation of recent decisions like *Miles v. Apex Marine Corp.*[2] "The view that admiralty judges fashion enlightened legal doctrines free of legislative restraint does not reflect the course that admiralty judges have steered in formulating the general maritime law in seas that have been dominated by civil codes and legislation for thousands of years."[3]

The "[j]udicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to the Federal Government in general terms,"[4] reflecting "the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations."[5] Once the general maritime law was adopted, however, the question arose as to which branch of government had the authority to modify the maritime law. Over 160 years ago, Chief Justice Taney declared that the maritime law was subject to regulation by Congress: "The power of Congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose,

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[2] 498 U.S. 19 (1990).

[3] W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 TUL. L. REV. 1355, 1359 (2001).

[4] *The St. Lawrence*, 66 U.S. (1 Black) 522, 526 (1861).

[5] *The Lottawanna*, 88 U.S. (21 Wall.) 558, 572-73 (1874).

hardly be questioned."[6] Justice Bradley later explained: "But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department."[7] Therefore, the Court summarized: "[I]t must now be accepted as settled doctrine that in the consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."[8]

II. Congress "Occupied the Field" of "Liability for Injuries to Seamen"[9]

Exercising its "paramount power" to determine maritime law, Congress has formulated rights and remedies for maritime workers since the inception of the nation. In fact, the first Congress enacted a statute regulating the payment of wages to seamen.[10] In the context of the remedies available to injured seamen and longshoremen, Congress has enacted maritime legislation that has radically restructured the principles

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[6] *The Genesee Chief*, 53 U.S. (12 How.) 443, 459-60 (1851).

[7] *The Lottawanna*, 88 U.S. at 576-77.

[8] *So. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917).

[9] *Lindgren v. United States*, 281 U.S. 38, 45, 47 (1930) (quoting *Patrone v. Howlett*, 237 N.Y. 394, 397, 143 N.E. 232, 233 (1924)).

[10] Act of July 20, 1790, ch. 29, § 6, 1 Stat. 133. Congress has periodically amended the statute, and current legislation regulating the employment of seamen is codified at 46 U.S.C. §§ 10301-10321, 10501-10509, 10601-10603, 10701-10711, 10901-10908, 11101-11112.

of general maritime law that had been enunciated by this Court.

As it was "established that in the courts of the United States no action at law can be maintained for [wrongful death] in the absence of a statute giving the right,"[11] the Court held in *The Harrisburg* that no action for wrongful death "will lie in the courts of the United States under the general maritime law."[12] While land-based workers such as longshoremen were afforded a negligence remedy against their employer by the general maritime law,[13] the Court in *The Osceola* denied seamen the same relief, holding that "seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure."[14] Thus, the general maritime law afforded injured seamen wages, maintenance and cure, and "indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship."[15]

Lacking a maritime remedy, the widow of a longshoreman who was killed on navigable waters sought relief under a state workers' compensation statute, but the Court struck down her attempt in *Southern Pacific Co. v. Jensen* because it violated the Constitution's requirement that the grant of admiralty jurisdiction to

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[11] 119 U.S. 199, 213 (1886).

[12] *Id.*

[13] *See Atl. Transp. Co. v. Imbrovek*, 234 U.S. 52, 63 (1914).

[14] 189 U.S. 158, 175 (1903).

[15] *Id.*

the federal courts "must have referred to a system of law coextensive with, and operating uniformly in, the whole country."[16] The Court decreed that the cure for the absence of a remedy lies with Congress, which has the "paramount power" to amend the general maritime law.[17]

Congress overhauled the remedies for both seamen and longshoremen in response to the decisions of this Court in *The Harrisburg*, *The Osceola*, and *Southern Pacific Co. v. Jensen*. In 1917, Congress enacted legislation to afford a state workers' compensation remedy to both seamen and longshoremen.[18] Although the Supreme Court recognized that "Congress could have enacted a compensation act applicable to maritime injuries,"[19] the Court did not believe it was constitutional for Congress to authorize states to provide the compensation remedy for maritime workers as "such an authorization would inevitably destroy the harmony and uniformity" required by the Constitution.[20]

After its effort to provide seamen and longshoremen with a workers' compensation remedy was invalidated, Congress decided to treat seamen and land-based workers differently, giving special treatment to seamen while treating land-based maritime

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[16] 244 U.S. at 215 (quoting *The Lottawanna*, 88 U.S. at 575).

[17] *Id.* The Court stated: "Congress can alone act upon it and provide the needed regulations." *Id.* at 217.

[18] *See* Act of Oct. 6, 1917, ch. 97, 40 Stat. 395.

[19] *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920).

[20] *Id.*

workers like other non-maritime laborers. Thus, Congress enacted the Jones Act,[21] extending to seamen the same negligence remedy afforded to interstate railroad workers in the Federal Employers' Liability Act,[22] and granting a state workers' compensation remedy to non-seamen.[23]

The congressional committee recognized the difference between the seamen's remedy of maintenance and cure and their tort claim for damages for unseaworthiness when it legislated the tort cause of action based on negligence under the Jones Act:

> A seaman is entitled to maintenance, care, and cure at the expense of the ship and to his wages to the end of the voyage without regard to the question of negligence. . . . The rules which govern his right to recover damages for an injury happening at sea because of negligence or fault are different from those which govern the right of recovery of any other class of workmen. ([Schuede] *v.* Zenith S. S. Co., 216 Fed., 566, 570) [(N.D. Ohio 1914)]. The special treatment which seamen have always had under the acts of Congress was recently emphasized by the provision in the merchant marine act of 1920 extending to seamen but not to other maritime workers the same rights of

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[21] Act of June 5, 1920, ch. 250, § 33, 41 Stat. 988, 1007, currently codified at 46 U.S.C. §§ 30104-30105.

[22] 45 U.S.C. §§ 51-60 (hereinafter referred to as "FELA").

[23] Act of June 10, 1922, ch. 216, 42 Stat. 634.

> recovery in case of work accidents now enjoyed by interstate railway employees.[24]

Consequently, after Congress had initially granted both seamen and longshoremen a workers' compensation remedy, Congress decided that seamen should be treated differently. Congress modified the seamen's tort cause of action for "negligence or fault" by enacting the Jones Act while retaining the seamen's distinct actions for maintenance and cure and wages that arise from the seamen's contract of employment.[25]

The Congressional effort to provide a state workers' compensation remedy to land-based maritime workers met with the same fate in this Court as the original attempt to provide a state workers' compensation remedy to seamen and longshoremen. However, in *Washington v. W.C. Dawson & Co.*, the Court explained the wide discretion Congress had "to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment," such as "a general Employers' Liability Law."[26]

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[24] S. REP. NO. 94, 67th Cong., 1st Sess. 2 (1921). *Schuede* involved an unseaworthiness action for damages brought in state court based on defective rigging. *Schuede*, 216 F. at 566.

[25] *See, e.g., Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932), in which Justice Cardozo explained that maintenance and cure is a "duty . . . imposed by the law itself as one annexed to the employment. . . . Contractual it is in the sense that it has its source in a relationship that is contractual in origin, but given its relation, no agreement is competent to abrogate the incident." (Citing *The Osceola*).

[26] 264 U.S. 219, 227 (1924).

Recognizing that the way to accomplish the goal of providing a workers' compensation remedy to maritime workers had been "clearly pointed out"[27] by this Court, Congress debated the scope of the federal compensation statute that became the Longshore and Harbor Workers' Compensation Act.[28] One of the major subjects of debate was whether all maritime workers, including seamen, should be subject to the uniform federal remedy that became the LHWCA:

> Initially, Congress was "reluctant" to include seamen in the bill for the reasons it had previously articulated.[29] However, the subject was reopened on the request of the shipping companies that seamen be included[30] and because "it was felt that perhaps the very bill might be imperiled if it did not have uniformity."[31] Consequently the counsel for the

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[27] 68 CONG. REC. 5413, 69th Cong., 2d Sess. (1927) (statement of Rep. O'Connor).

[28] The Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (hereinafter referred to as "LHWCA").

[29] 68 CONG. REC. 5410, 69th Cong., 2d Sess. (1927) (statement of Rep. Graham).

[30] *See, e.g.*, Hearing on S. 3170, Before the House Committee on the Judiciary, To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments, 69th Cong., 1st Sess. 202, 216 (1926); Hearing on H.R. 9498, Before the House Committee on the Judiciary, To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments, 69th Cong., 1st Sess. 50, 58, 101, 153, 195 (1926) (hereinafter cited as Hearing on H.R. 9498).

[31] 68 CONG. REC. 5410, 69th Cong., 2d Sess. (1927) (statement of Rep. Graham).

> American Steamship Owners' Association testified[32] "that if workmen's compensation is a sound economic policy," then "everybody in the industry," should be covered, including the "master and crew and everybody connected with the steamship."[33]

Seamen protested being included in the federal compensation statute because they did not want to give up their maintenance and cure remedy in exchange for workers' compensation. They spoke through Andrew Furuseth, President of the International Seamen's Union of America:

> One of the best arguments in favor of compensation on shore is, that the help comes practically at once, while liability is at best slow. On shore and in harbor, as applied to harbor workers, that is true. The worker is at home or with friends and the commission is near and accessible; but the seaman is away from country, home, and friends. The vessel is away from the commission. She may be in Asia, South Sea Islands, Australia, or Africa, away even from consuls or commercial agents, and if the care and cure is abolished, the men are likely to be thrown on shore to be eaten by strange dogs.[34]

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[32] Hearing on H.R. 9498, *supra* note 30, at 50.

[33] Kenneth G. Engerrand, *The Fleet Rule for Seamen Status*, 2 LOY. MAR. L.J. 92, 104 (2003). *See id.* at 94–107 for a comprehensive discussion of the legislative history of the Jones Act.

[34] Hearing on H.R. 9498, *supra* note 30, at 112.

Siding with the seamen, Congress decided not to include seamen within the federal workers' compensation statute,[36] excluding "a master or member of a crew of any vessel" when the LHWCA was enacted.[36]

The Jones Act extends to seamen the rights of recovery in the FELA: "Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."[37] The FELA contains provisions setting forth the liability of the carrier for negligence,[38] and the diminution of recovery for the employee's negligence,[39] but the compensation for liability is simply "in damages."[40] The "damages" were defined by the Court in *Michigan Central R.R. v. Vreeland*[41] seven years before the incorporation of the FELA by the Jones Act.

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[35] Chief Justice Hughes recognized the effect of the seamen's preference to remain outside the provisions of the federal compensation statute in *Nogueira v. N.Y., N.H. & H.R. Co.*, 281 U.S. 128, 136 (1930), citing the Congressional debate at 68 CONG. REC. 5908, 69th Cong., 2d Sess. (1927). In the debate cited by Chief Justice Hughes, Senator Norris explained: "The seamen, through their organized representative here, Andrew Furuseth, wanted to remain out. They were satisfied with their condition and did not want to be included in this law." 68 CONG. REC. 5908, 69th Cong., 2d Sess. (1927) (statement of Sen. Norris).

[36] The crewmember exclusion is currently codified at 33 U.S.C. § 902(3)(G).

[37] 46 U.S.C. § 30104.

[38] *See* 45 U.S.C. § 51.

[39] *See id.* § 53.

[40] *Id.* § 51.

[41] 227 U.S. 59 (1913).

Construing the FELA in *Vreeland*, the Court stated: "By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states."[42] With respect to damages, the Court concluded: "It is a liability for the loss or damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only."[43] The Court noted that "in giving an action for the benefit of certain members of the family of the decedent, [the FELA] is essentially identical with . . . Lord Campbell's Act,"[44] and that Act and "all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage."[45]

As with Lord Campbell's Act, the Court stated that the damages under the FELA "are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries."[46] As there must be "some reasonable expectation of pecuniary assistance or support of which they have been deprived," the Court held that "[c]ompensation for such loss

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[42] *Id.* at 66.

[43] *Id.* at 69.

[44] *Id.*

[45] *Id.* at 71.

[46] *Id.* at 70.

manifestly does not include damages by way of recompense for grief or wounded feelings."[47] Similarly, the term pecuniary "'excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of value.'"[48] As the jury instruction in *Vreeland* was not "confined to a consideration of the financial benefits which might reasonably be expected from [the decedent] in a pecuniary way" and which were "capable of being measured by any material standard," the verdict had to be reversed.[49]

The Court explained the damages recoverable in FELA cases in *American R.R. v. Didricksen*: "The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained."[50] Consequently, by enacting the Jones Act, Congress knowingly amended the tort remedy for seamen provided by the general maritime law with the favorable negligence standard provided in the FELA but with the limitations on recovery provided by that statute, as the

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[47] *Id.*

[48] *Id.* at 71 (quoting *Tilley v. Hudson River R.R.*, 24 N.Y. 471, 476 (1862)).

[49] *Vreeland*, 227 U.S. at 73. The Court distinguished care and advice, which can be measured by a pecuniary standard. *See id.* at 73-74.

[50] 227 U.S. 145, 149 (1913); *see also Gulf, Colo., & Santa Fe Ry. v. McGinnis*, 228 U.S. 173, 175-76 (1913).

Court recognized in *Miles*: "When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well."[51]

In summary, after this Court held that seamen had maritime remedies of wages, maintenance and cure, and an indemnity for unseaworthiness of the vessel, but no negligence remedy, Congress tried to give seamen a state workers' compensation remedy, but that statute was declared unconstitutional. Next, Congress amended the seamen's tort remedy by extending to seamen "the same rights of recovery in case of work accidents [then] enjoyed by interstate railway employees."[52] Finally when enacting a uniform federal compensation statute for maritime workers, Congress considered providing seamen with a simple, uniform federal workers' compensation remedy, but instead decided that seamen should retain their tort remedy, modified by the Jones Act, to supplement their contract-based remedies of maintenance and cure and wages.

The effect of the Jones Act on seamen's maritime remedies was addressed by this Court in *Panama R.R. v. Johnson*[53] and *Lindgren v. United States*.[54] In

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[51] *Miles*, 498 U.S. at 32.

[52] S. REP. NO. 94, *supra* note 24, at 2.

[53] 264 U.S. 375 (1924).

[54] 281 U.S. 38 (1930).

Panama R.R. the seaman's employer argued that the Jones Act was unconstitutional because it "enables a seaman asserting a cause of action essentially maritime to withdraw it from the reach of the maritime law and the admiralty jurisdiction, and to have it determined according to the principles of a different system applicable to a distinct and irrelevant field."[55] Although the Court considered that argument to present a "grave question" with respect to the "constitutional validity" of the Jones Act,[56] the Court was able to interpret the Act in a way so as to preserve its constitutionality. When the Jones Act provided that seamen may maintain an action for damages at law and that the FELA would apply to that action, the Court distinguished between the tort action for damages, to which the FELA applied, and the contract-based remedies of maintenance and cure and wages: "So we think the reference is to all actions brought to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules, usually consisting of wages and the expense of maintenance and cure."[57]

Just as the FELA "took possession of the field of the employers' liability to employees in interstate transportation by rail,"[58] so too did the Jones Act take possession of "the entire field of liability for injuries to

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[55] *Panama R.R.*, 264 U.S. at 387.

[56] *Id.* at 390.

[57] *Id.* at 391.

[58] *Lindgren*, 281 U.S. at 45.

seamen."[59] Comparing the Jones Act and FELA, the Court in *Lindgren* found it "plain that the [Jones Act] is one of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution," and that "there is nothing in it to cause its operation to be otherwise than uniform."[60] The Court explained that the incorporation of the FELA "establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen" and that the Jones Act "is as comprehensive of those instances in which by reference to the [FELA] it excludes liability, as of those in which liability is imposed."[61] Thus, the Court stated that the Jones Act "covers the entire field of liability for injuries to seaman" and is "paramount and exclusive."[62] As the Jones Act "occupied the field and became a part of the general maritime law,"[63] the Court held that the plaintiff had "no resort" to state law "to establish a measure of damages not provided by that Act."[64] Thereafter, this Court has not wavered from its deference to Congress's paramount role in defining seamen's remedies: "Whatever may be this Court's special responsibility for fashioning rules in maritime affairs, we do not believe that we

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[59] *Id.* at 47.

[60] *Id.* at 44.

[61] *Id.* at 46-47.

[62] *Id.* at 47.

[63] *Id.* at 45.

[64] *Id.* at 47.

should now disturb the settled plan of rights and liabilities established by the Jones Act."[65]

The reference in *Gillespie* to this Court's special responsibility for fashioning rules in maritime cases is as determinative in the present case as it was in *Gillespie* and later in *Miles*. When Congress has addressed the damages for workers such as seamen, as it did in the enactment of the Jones Act, the special solicitude shown to seamen must give way to the "settled plan of rights and responsibilities established by the Jones Act."[66] And the effect of Congressional legislation is not limited to preemption of state remedies but has a greater impact with respect to displacement of federal remedies in light of the preeminent role of Congress in fashioning principles of general maritime law, as discussed *infra*.[67]

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[65] *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 155 (1964) (citing *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20-21 (1963)).

[66] *Gillespie*, 379 U.S. at 155.

[67] Thus, although this Court in *Miles* stated that "[t]he Jones Act . . . does not disturb seamen's general maritime claims for injuries from unseaworthiness," 498 U.S. at 29, the Court displaced the damages available in unseaworthiness cases in deference to the damages available in the Congressional Jones Act remedy that had occupied the field:

> The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that Torrengano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme

III. Seamen May Not Recover Punitive Damages in Actions Alleging Unseaworthiness

The issue presented to this Court is not whether *Miles* addresses punitive damages or whether *Miles* should be applied narrowly or broadly. The question is simply whether the Court should, by supplementing the damages provided by Congress with an element of recovery that was not afforded by the Jones Act, "disturb the settled plan of rights and remedies established by the Jones Act,"[68] in which Congress "cover[ed] the entire field of liability for injuries to seamen."[69] That issue was not new to the Court in *Miles*. Its answer was not affected by the Court's decision in *Atlantic Sounding Co. v. Townsend*.[70] Like Congress, this Court has long recognized the distinction between the seamen's remedies arising from their employment relationship (maintenance and cure and wages) and their separate tort remedy based on negligence or unseaworthiness.

In *Pacific S.S. Co. v. Peterson*, the Court addressed the effect of the Jones Act on seamen's general

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> were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

Id. at 32-33.

[68] *Gillespie*, 379 U.S. at 155.

[69] *Lindgren*, 281 U.S. at 47.

[70] 557 U.S. 404 (2009).

maritime claims: wages, maintenance and cure, and "indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship."[71] The seaman's employer argued that the recovery of maintenance and cure was an election that barred recovery under the Jones Act.[72] The Court disagreed as "the new rule to compensatory damages for injuries caused by negligence is not an alternative of the right under the old rule to maintenance, cure and wages," which the Court considered to "grow[] out of" "the 'personal indenture' created by the relation of the seaman to his vessel."[73] The remedies of wages and maintenance and cure do not "'displace or affect the right of the seaman to recover against the master or owners for injuries by their unlawful or negligent acts,'"[74] and "a recovery in one proceeding for wages and maintenance and cure does not preclude the recovery in a subsequent proceeding of indemnity for injuries resulting from unseaworthiness."[75] "[T]he right to maintenance, cure and wages, implied in law as a contractual obligation arising out of the nature of employment, is independent of the right to indemnity or compensatory damages for any injury caused by negligence."[76] The Court explained that, in contrast to maintenance and cure,

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[71] 278 U.S. 130, 134 (1928).

[72] *See id.* at 135.

[73] *Id.* at 136-37 (quoting *The Montezuma*, 19 F.2d 355, 356 (2d Cir. 1927)).

[74] *Peterson*, 278 U.S. at 137 (quoting *The A. Heaton*, 43 F. 592, 596 (C.C.D. Mass. 1890)).

[75] *Peterson*, 278 U.S. at 137.

[76] *Id.* at 138.

there is a single legal wrong for negligence and unseaworthiness for which the seaman "is entitled to but one indemnity by way of compensatory damages:"

> The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by the statute. . . . But, whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong . . . for which he is entitled to but one indemnity by way of compensatory damages."[77]

In consideration of the difference between maintenance and cure and the damage remedies of negligence and unseaworthiness, seamen are not required to elect between "the right to recover compensatory damages for a tortious injury under the new rule and the contractual right to maintenance, cure and wages under the old rules."[78]

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[77] *Id.*

[78] *Id.* at 139.

The effect of the Jones Act on the seaman's damage claim for unseaworthiness is much different than its effect on the claims for wages and maintenance and cure. In *McAllister v. Magnolia Petroleum Co.* the Court imposed a similar time limitation for bringing unseaworthiness cases as that contained in the Jones Act.[79] In contrast to maintenance and cure, the Court stated that "if the seaman is to sue for both unseaworthiness and Jones Act negligence, he must do so n a single proceeding."[80] The Court explained that unseaworthiness and negligence are "but alternative 'grounds' of recovery for a single cause of action."[81] Consequently, "[a] judgment in the seaman's libel for unseaworthiness was held to be a complete 'bar' to his subsequent action for the same injuries under the Jones Act."[82] Professors Gilmore and Black summarized the relationship between the Jones Act and unseaworthiness counts: "The Jones Act count and the unseaworthiness count overlap completely: they derive from the same accident and look toward the same recovery."[83] "[T]he Jones Act count and the unseaworthiness count are Siamese twins."[84]

When this Court overruled *The Harrisburg* and held "that an action does lie under general maritime

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[79] 357 U.S. 221, 225 (1958).

[80] *Id.* at 224.

[81] *Id.* at 225.

[82] *Id.*

[83] GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-38 at 383 (2d ed. 1975).

[84] *Id.*

law for death caused by maritime duties" in *Moragne v. States Marine Lines, Inc.*,[85] the Court proceeded cautiously in light of the "numerous and broadly applicable statutes."[86] The Court explained: "The legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved." The policy thus established has become itself a part of our law."[87] The Court described the effect of congressional action: "The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect."[88]

The effect of the sphere of Congressional enactments on the damages that could be recovered in actions under the general maritime law was presented to the Fifth Circuit in *Law v. Sea Drilling Corp.*[89] Consigning the federal statutes to "the scrap heap,"[90] the court freely supplemented the congressional balance (that limited recovery to pecuniary damages) by permitting recovery of non-pecuniary loss of society, stating: "It is time that the dead hand of *The Harrisburg*—whether in the courts or on the elbow of the

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[85] 398 U.S. 375, 409 (1970).

[86] *Id.* at 390.

[87] *Id.* at 390-91.

[88] *Id.* at 392.

[89] 510 F.2d 242 (5th Cir.), *reh'g denied*, 523 F.2d 793 (5th Cir. 1975).

[90] *Law*, 523 F.2d at 796 (quoting THE LAW OF ADMIRALTY, *supra* note 83, § 6-33 at 370).

congressional draftsmen of DOHSA—follow the rest of the hulk to an honorable rest in the briney [sic] deep."[91]

In *Mobil Oil Corp. v. Higginbotham*[92] this Court disagreed sharply with the Fifth Circuit's consignment of federal statutes to the scrap heap. Following its decision in *Law v. Sea Drilling*, the Fifth Circuit held that damages for loss of society were recoverable in the case of deaths on the high seas.[93] The issue presented to this Court was whether damages for loss of society were recoverable under the general maritime law where the death occurred on the high seas. The plaintiffs argued "that admiralty courts have traditionally undertaken to supplement maritime statutes and that such a step is necessary in this case to preserve the uniformity of maritime law."[94] The Court did not "pause to evaluate the opposing policy arguments," reasoning: "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses."[95] The Court stated: "DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right."[96] The Court recognized that DOHSA

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[91] *Law*, 523 F.2d at 798 (referring to the Death on the High Seas Act, 46 U.S.C. §§ 30301-30308, hereinafter referred to as DOHSA).

[92] 436 U.S. 618 (1978).

[93] *Id.* at 618-19 & n.1.

[94] *Id.* at 624.

[95] *Id.* at 623.

[96] *Id.* at 624.

"announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages."[97] The Court concluded: "In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries."[98] As "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements,"[99] the Court reversed the decision of the Fifth Circuit that the beneficiaries could recover nonpecuniary damages for loss of society.

Miles v. Apex Marine Corp. involved the death of a seaman in state waters as a result of both negligence and unseaworthiness.[100] As recovery was permitted under the Jones Act (negligence) and general maritime law (unseaworthiness), the issue was presented whether nonpecuniary loss of society was available because of the unseaworthiness finding. The Court in *Miles* discussed the effect of statutory enactments on the maritime law, noting: "Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty

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[97] *Id.* at 625.

[98] *Id.*

[99] *Id.*

[100] *See id.* at 21-22.

principles."[101] The Court described the effect of congressional enactments on the general maritime law:

> In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.[102]

Although the enactment of the Jones Act "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness," the Court held that "the Jones Act establishes a uniform system of seamen's tort law parallel to that available to employees of interstate railway carriers under FELA."[103] Thus, the damages for the maritime unseaworthiness count do not "supplement" the damages allowed by the Jones Act negligence count, as the "logic of *Higginbotham* controls our decision here."[104] The Court reiterated its reasoning from *Higginbotham* for the "preclusive

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[101] *Id.* at 24.

[102] *Id.* at 27.

[103] *Id.* at 29.

[104] *Id.* at 31.

effect of the Jones Act for deaths of true seamen:"[105] "But in an 'area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.' "[106]

Like DOHSA, which contains an express provision for recovery of pecuniary damages,[107] the FELA, whose provisions were adopted by the Jones Act, "consistently [has] been interpreted as providing recovery only for pecuniary loss."[108] Thus, the Jones Act incorporates the FELA's pecuniary loss limitation and "precludes recovery for loss of society,"[109] which, like punitive damages, is a nonpecuniary loss.

As it had done in *Higginbotham* with respect to DOHSA, the Court in *Miles* limited recovery under the general maritime law to the damages allowed by Congress in the Jones Act:

> The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general

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[105] *Id.* at 32.

[106] *Id.* at 31 (quoting *Higginbotham*, 436 U.S. at 625).

[107] *See* 46 U.S.C. § 30303.

[108] *Miles*, 498 U.S. at 32 (citing *Vreeland*, 227 U.S. at 69-71).

[109] *Id.* As noted above, the Court explained:

> When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well.

Id.

> maritime claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.[110]

Thus, the Court established "a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law."[111]

The decision of this Court in *Atlantic Sounding Co. v. Townsend* draws the same distinction in remedies that Congress sought to enact in its amendment of the general maritime law in the Jones Act and LHWCA. *Townsend* involved a seaman's claim for punitive damages for the willful failure to pay maintenance and cure. The Court reiterated its reasoning from *Miles*, which the Court advised "remains sound."[112] The Court stated: "It would have been illegitimate to create common-law remedies that exceeded those remedies statutorily available under the Jones Act and DOHSA."[113]

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[110] *Id.* at 32-33.

[111] *Id.* at 33.

[112] *Townsend*, 557 U.S. at 420.

[113] *Id.*

In comparison to the Siamese twins of unseaworthiness and Jones Act negligence, where the two theories are "inseparable and indivisible parts of a single cause of action,"[114] the Court in *Townsend* recognized that "a seaman's action for maintenance and cure is 'independent' and 'cumulative' from other claims such as negligence, and that the maintenance and cure right is 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages [under the Jones Act].'"[115] The Court agreed that "the Jones Act and the unseaworthiness remedies are additional to maintenance and cure: the seaman may have maintenance and cure and also one of the other two."[116] Unlike the seaman's remedy for damages based on negligence and unseaworthiness, where Congress has occupied the field, "the Jones Act does not address maintenance and cure or its remedy."[117] Thus, in contrast to unseaworthiness, for maintenance and cure it is "possible to adhere to the traditional understanding of maritime

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[114] Kenneth G. Engerrand & Scott R. Brann, *Troubled Waters for Seamen's Wrongful Death Actions*, 12 J. MAR. L. & COM. 327, 348 (1981) (citing *McAllister*, 357 U.S. at 224-25). Although the Court in *McAllister* recognized the three bases for recovery, maintenance and cure, negligence under the Jones Act, and unseaworthiness, *id.* at 224, the Court differentiated the negligence and unseaworthiness remedies from maintenance and cure, describing the Jones Act and unseaworthiness claims as "but alternative 'grounds' of recovery for a single cause of action." *Id.* at 225.

[115] *Townsend*, 557 U.S. at 423 (quoting *Peterson*, 278 U.S. at 138, 139).

[116] *Id.* at 424 (quoting THE LAW OF ADMIRALTY, *supra* note 83, § 6-23 at 342).

[117] *Townsend*, 557 U.S. at 420.

actions and remedies without abridging or violating the Jones Act; unlike wrongful-death actions, this traditional understanding is not a matter to which 'Congress has spoken directly.' "[118]

As Congress has occupied the field for seamen's damage actions and has spoken directly to the amount of damages recoverable in the seamen's liability action for damages, the issue is whether the limitation to pecuniary damages with the FELA and Jones Act precludes an award of punitive damages for the tort action based on unseaworthiness. For the reasons expressed by this Court in *Vreeland*, the courts recognize that: "Punitive damages are non-pecuniary. Under our precedent, therefore, they may not be awarded on a claim of negligence based on the Jones Act. Any argument that they should be available ought to be addressed to Congress."[119] "It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under the [FELA]."[120] Consequently, "since the Supreme Court's authoritative interpretation of FELA antedated enactment of the Jones Act, *Miles* mandates the conclusion

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[118] *Id.* at 420-21 (quoting *Miles*, 498 U.S. at 31).

[119] *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984).

[120] *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993); *see also Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Kozar v. Chesapeake & Ohio Ry.*, 449 F.2d 1238, 1240 (6th Cir. 1971).

that punitive damages are not available in an unseaworthiness action under general maritime law."[121]

The distinction Congress made between the cause of action for damages and the distinct remedy for maintenance and cure is no different in the case of injury than it is for death. The Jones Act was enacted to create a damage remedy for injury or death to supplement the maintenance and cure remedy afforded by the general maritime law. The occupation of the field by the enactment of the Jones Act is the same in both cases, and the same incorporation of the limitations of the FELA applies. In fact, *Townsend*'s careful distinguishing of *Miles*, while acknowledging that the analysis in *Miles* remains sound, was based on decisions such as *Pac. S.S. Co. v. Peterson*, which involved an injury to a seaman, not a wrongful death. Quoting *Peterson*, the Court in *Townsend* "emphasiz[ed] that a seaman's action for maintenance and cure is "independent" and "cumulative" from other claims such as negligence and that the maintenance and cure right is "in no sense inconsistent with, or an alternative of, the right to recover compensatory damages [under the Jones Act]."[122]

Whether the seaman was killed, as in *Miles*, or injured, as in *Peterson*, this Court has recognized that "whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the

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[121] *Horsley*, 15 F.3d at 203.

[122] *Townsend*, 557 U.S. at 423 (quoting *Peterson*, 278 U.S. at 138).

negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong . . . for which he is entitled to but one indemnity by way of compensatory damages."[123] Consequently, Congress' occupation of the field for a seaman's liability claim, whether for death or injury and whether for negligence or unseaworthiness, or both, simply leaves this Court with nothing to supplement.

CONCLUSION

Congress exercised its paramount power to amend the maritime law when it occupied the field for seamen's damages by the enactment of the Jones Act. Congress had given seamen state workers' compensation remedies and debated including them in the uniform federal compensation statute, the LHWCA. However, Congress decided to retain seamen's contract-based remedies of wages and maintenance and cure while occupying the field of tort liability for injuries to seamen with the Jones Act. In contrast to the claims for maintenance and cure and wages, the damage claims of unseaworthiness and Jones Act negligence overlap completely as Siamese twins because a seaman is "entitled to but one indemnity by way of compensatory damages" for a "single wrongful invasion of his primary right of bodily safety and but a single legal

[123] *Peterson*, 278 U.S. at 138.

wrong," whether the "injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined."[124] Thus, when Congress adopted the pecuniary loss limitation from the FELA, the courts were not free to supplement that limitation. As Congress has exercised its superior authority with respect to the specific issue presented—damages in the seaman's liability claim—this Court should not "disturb the settled plan of rights and remedies established by the Jones Act"[125] by consigning the congressional determination of damages to the scrap heap.

Respectfully submitted,

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[124] *Id.*

[125] *Gillespie*, 379 U.S. at 155.

No. 18-266

In the Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF AT-SEA PROCESSORS ASSOCIATION, PACIFIC SEAFOOD PROCESSORS ASSOCIATION, GROUNDFISH FORUM, NATIONAL FISHERIES INSTITUTE, FREEZER LONGLINE COALITION, AND ALASKA BERING SEA CRABBERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF AT-SEA PROCESSORS ASSOCIATION, PACIFIC SEAFOOD PROCESSORS ASSOCIATION, GROUNDFISH FORUM, FREEZER LONGLINE COALITION, NATIONAL FISHERIES INSTITUTE, AND ALASKA BERING SEA CRABBERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The At-sea Processors Association (APA) represents six companies that own and operate sixteen U.S.-flagged catcher/processor vessels that participate principally in the Alaska pollock fishery and west coast Pacific whiting fishery. By weight, these fisheries account for more than one-third of all fish harvested in the U.S. each year.

Pacific Seafood Processors Association (PSPA) is a nonprofit seafood industry trade association. Its corporate members are major seafood processing companies with operations in Alaska and Washington. PSPA was founded in 1914 to foster a better public understanding of the importance of the seafood industry and has been in continuous and active operation since that time.

Groundfish Forum (GF) is a trade association that represents five companies that operate 19 trawl catcher processor vessels in the yellowfin sole, rock

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. Both parties have filed blanket consents to the filing of *amicus* briefs with the Clerk.

sole, flathead sole, Atka mackerel, Pacific Ocean perch, and Pacific cod fisheries off Alaska. Groundfish Forum's mission is to promote the sustainable harvest and economic viability of fisheries while ensuring resource conservation, habitation protection, and practicable bycatch management.

The Freezer Longline Coalition (FLC) is a trade association representing participants in the freezer longline sector of the Alaska cod fishery. FLC includes 11 Washington and Alaska-based members which operate 30 vessels in the federal waters of the Bering Sea, Aleutian Islands, and the Gulf of Alaska. FLC members are united in their commitment to sustainable fishing practices in the North Pacific.

The National Fisheries Institute (NFI) represents hundreds of companies from all facets of the commercial seafood industry in the United States, including seafood harvesters, vessel owners, and processors dependent on those harvesters for product. NFI member companies produce, process, distribute, and serve to hundreds of millions of American consumers a sustainable, highly nutritious protein.

Members of The Alaska Bering Sea Crabbers (ABSC) fish for King, Snow, and Bairdi crab in the Bering Sea. They are also actively involved in scientific research, policy development, and marketing. ABSC is committed to ensuring the long-term sustainability of its members' fishery.

Amici's members have a strong interest in the resolution of this case. As marine operators, each is subject to the Jones Act and to general maritime law doctrines such as unseaworthiness. *Amici* file this

brief to explain why the issue of punitive damages under maritime law is exceptionally important to the American maritime industry.

INTRODUCTION AND SUMMARY OF ARGUMENT

The maritime industry is the lifeblood of the economy of the United States—and of the world. It transports 90 percent of the world's goods.[2] It directly and indirectly accounts for 2.5 million American jobs and contributes $100 billion to the U.S. economy annually.[3] And it contributes hundreds of billions of dollars' worth of fish each year to the food supply.[4] In holding that punitive damages are available under the maritime doctrine of unseaworthiness, the decision below exposes this critical industry to a potentially massive increase in damages exposure—a result that is mistaken as a matter of law and misguided as a matter of policy. This Court should grant review of this important question and reverse the judgment below.

The doctrine of unseaworthiness is the predominant means of recovery for seamen injured on the job. The impact of the court of appeals' decision to make punitive damages available for unseaworthiness claims, if allowed to stand, will accordingly be sweeping. It will markedly increase maritime opera-

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[2] See Natasha Geiling, How the Shipping Industry is the Secret Force Driving the World Economy, Smithsonian.com, Oct. 15, 2013, perma.cc/E3R6-XSEN.

[3] Navy League of the U.S., *America's Maritime Industry* 14, perma.cc/AA7W-PAZB.

[4] See NOAA, Press Release, U.S. fishing generated more than $200B in sales in 2015; two stocks rebuilt in 2016, May 9, 2017, perma.cc/C5SY-FVN3.

tors' litigation costs, result in higher prices for consumers, make the U.S. maritime industry less competitive with industries in countries whose law precludes punitive damages, and lead to forum-shopping, as domestic and foreign plaintiffs alike elect to sue in the Ninth Circuit, Washington state court, and any other forum that subsequently joins that side of the split. These very troubling consequences warrant this Court's immediate intervention.

The decision below not only threatens grave harm to the maritime industry; it is also wrong on the merits. Permitting punitive damages in unseaworthiness cases destroys the uniformity between the unseaworthiness remedy and the Jones Act remedy and will lead to windfall recoveries in situations in which Congress clearly intended that plaintiffs recover only compensatory damages. The decision below accordingly should be reversed.

ARGUMENT

A. The Court Should Address The Question Presented Now.

The question presented—as to which lower courts undeniably are divided—arises frequently and thus cries out for this Court's attention. As this Court observed almost fifty years ago, "[t]he unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 399 (1970); see also *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 208 (1996) (unseaworthiness has "eclipsed ordinary negligence as the primary basis of recovery when a seafarer was in-

jured or killed"). The question whether punitive damages are available in unseaworthiness actions is thus a matter of paramount importance to maritime operators and seamen alike.

The split of authority on this issue merits this Court's immediate attention. As this Court has recognized, it is especially important that maritime law be uniform from jurisdiction to jurisdiction, because "the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities." *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 676 (1982); see also, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (noting "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country'") (quoting *Moragne*, 398 U.S. at 402). It is self-evidently harmful to the maritime industry for maritime operators in one part of the country to be subject to greater potential liability than those in other parts of the country—or for one maritime defendant's legal exposure to vary depending on where its vessels operate and where shipboard accidents happen to occur. See Geoffrey L. Wendt, *The Fog of Uncertainty Enshrouding Employer Punitive Damage Liability Under General Maritime Law*, 2 MARITIME L. BULL. SPECIAL INSERT 1, 100 (2010).

The effects of the decision below will also be especially widely felt. In the most recent twelve-month period for which data are available, the Ninth Circuit saw the second greatest number of maritime-law personal injury appeals, after the Fifth Circuit,[5] and

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[5] See *U.S. Court of Appeals—Civil and Criminal Cases Commenced, by Circuit and Nature of Suit or Offense, During the*

saw the third greatest number of new maritime personal-injury cases commenced, after the Fifth and Eleventh Circuits.[6] The circuit split on this issue thus now encompasses two of the busiest forums in the Nation for adjudicating maritime injury cases.

Moreover, injured seamen will now surely bring unseaworthiness claims in the Ninth Circuit (or Washington state court) whenever possible. And although personal-jurisdiction rules may limit the extent to which cases can be brought in the Ninth Circuit, they are unlikely to prevent such forum shopping entirely. The Ninth Circuit's jurisdiction encompasses the entirety of the American West Coast, as well as Alaska, Hawaii, and the Pacific Ocean territories of Guam and the Northern Mariana Islands. Many shipping companies and other maritime employers do business within the Ninth Circuit and could be haled into court there in many cases, on either a general- or specific-jurisdiction theory. And as this Court has noted in a related context, a difference between U.S. and foreign law is likely to encourage foreign plaintiffs to bring claims in U.S. courts. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 403-04 (1975) ("[T]he United States is now virtually alone among the world's major maritime nations in not adhering to the [Brussels Collision Liability] Convention with its rule of proportional fault—a fact that encourages transoceanic forum shopping.").

12-Month Period Ending March 31, 2018 (2018), http://www.uscourts.gov/file/24414/download

[6] See *U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2017* (2017), http://www.uscourts.gov/sites/default/files/data_tables/jb_c3_0930.2017.pdf.

In short, the decision below introduces significant uncertainty into one of the most important doctrines in maritime law, by creating a critical disparity between defendants' potential liability for unseaworthiness in the Ninth Circuit and their risk of such liability elsewhere. The impact of this disparity will be to burden maritime defendants and undermine the uniform system of maritime law. That prospect warrants this Court's intervention without delay.

B. The Question Presented Is Vitally Important To The Maritime Industry And To The National Economy.

Allowing plaintiffs to recover punitive damages for unseaworthiness claims would have a critical impact on the U.S. maritime industry. Defendants' potential liability, and their vulnerability to settlement pressure, would rise dramatically—causing an increase in litigation costs that would make these companies less competitive with foreign maritime operators and increase the prices that their consumers pay.

1. Opening the door to punitive damages in unseaworthiness cases would make such cases far more difficult for defendants to litigate. As a leading authority on tort law has explained, the "risk of suffering a crushing punitive damages penalty" discourages defendants from litigating claims on the merits, leading to "so-called 'blackmail settlements'" in which claims are settled for more than they are "reasonably worth." James A. Henderson, Jr., *The Impropriety of Punitive Damages in Mass Torts* 21, 52 Ga. L. Rev. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009389. Indeed, "uncounted thousands of cases

settle on terms different than those on which they would otherwise settle because of the possibility of punitive damages." Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 625 (1997).

This Court has recognized the same dynamic in the class-action context, where class certification—or even the mere styling of a lawsuit as a putative class action—exerts tremendous pressure on a defendant to settle. See, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (describing "the risk of 'in terrorem' settlements that class actions entail"); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

To be sure, this Court has held that punitive damages in maritime cases generally should not exceed the amount of compensatory damages (*Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 513 (2008)), and that guidance would presumably apply to punitive damages for unseaworthiness if such damages were held to be available. But since the decision in *Exxon Shipping*, courts have *not* uniformly limited punitive damages to the amount of compensatory damages in maritime cases. See, *e.g.*, *Warren* v. *Shelter Mut. Ins. Co.*, 233 So. 3d 568, 599 (La. 2017) (reducing $23 million punitive award to $4.25 million where compensatory damages were $125,000 on ground that $4.25 million is twice the total value of the harm caused by the conduct); *McWilliams* v. *Exxon Mobil Corp.*, 111 So. 3d 564, 579 (La. Ct. App. 2013) (upholding $12 million punitive award in case involving $5.5 million in actual damages); *Clausen* v.

Icicle Seafoods, Inc., 272 P.3d 827, 834 (Wash. 2012) (refusing to reduce $1.3 million punitive award where compensatory damages for maintenance and cure were $37,420 and attorneys' fees and costs, which court included in denominator, were $428,105). Moreover, even a 1:1 cap would be cold comfort because compensatory damages in unseaworthiness cases can reach into the multiple millions of dollars.[7] Even allowing double the already-considerable damages available in unseaworthiness cases would put maritime operators in a highly precarious position.

The predictable effect of making punitive damages available in unseaworthiness cases, therefore, will be to coerce maritime defendants into settling even dubious unseaworthiness claims, raising their litigation costs. Because those costs are likely to be passed on to consumers, the result will be higher prices for fish or any other commodity harvested or transported by ships.

2. Permitting punitive damages in this context would also undermine the American maritime industry's ability to compete with other countries. Many European countries follow the civil-law tradition, under which punitive damages are generally unavailable in civil cases. See John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507,

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[7] See, *e.g.*, *Doss* v. *M/V K2*, 2016 WL 6962501, at *3 n.13 (E.D. La. Nov. 29, 2016) (indicating that plaintiff was seeking $1.5 million in compensatory damages); *Burdett* v. *Matson Navigation Co.*, 2015 WL 419694, at *1 (D. Haw. Jan. 30, 2015) (indicating that plaintiff was seeking $7 million in compensatory damages).

510 & n.16 (2007) (citing sources from Switzerland, Italy, Belgium, Spain, Germany, Finland, Greece, Poland, Russia, the Czech Republic, and the Netherlands); see also *Exxon Shipping*, 554 U.S. at 497 ("Noncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries as France, Germany, Austria, and Switzerland."). The same is true in Japan. See 2 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 22.2(B)(10) (7th ed. 2015). And in China, punitive damages are available only in certain consumer cases. See Vincent R. Johnson, *Punitive Damages, Chinese Tort Law, and the American Experience*, 9 FRONTIERS L. CHINA 321, 321-22 (2014).

Maritime defendants' damages exposure is thus dramatically greater under the court of appeals' view of U.S. maritime law than under the law of other nations. Imposing that potential liability on the American maritime industry will invariably raise the industry's costs—driving business toward maritime companies that use ships flagged in other countries and have less exposure to U.S. maritime law.[8]

C. The Decision Below Is Erroneous.

The need for this Court's review is made all the more urgent because the decision below is wrong. As petitioner explains (Pet. 12-23), the court of appeals' decision cannot be reconciled with this Court's hold-

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[8] To be sure, under the multifactor test articulated by this Court in *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953), a tort involving a foreign-flagged ship may sometimes be adjudicated under U.S. maritime law. But this is the exception rather than the rule. As the Court explained in *Lauritzen*, "the weight given to the [flag] overbears most other connecting events in determining applicable law." *Id.* at 585.

ing in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990), that the limitations imposed by Congress on recoverable damages under the Jones Act apply to "general maritime actions"—such as unseaworthiness—as well. But even if *Miles* had not so held, the decision below would be just as indefensible.

To begin with, relying on this Court's decision in *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404 (2009), the court of appeals assumed that punitive damages were available in unseaworthiness cases prior to the passage of the Jones Act. Pet. App. 12a. But that assumption is unfounded. When five judges of the Fifth Circuit examined the issue, they noted only one unseaworthiness case potentially awarding punitive damages around the time of the Jones Act—and in fact, that case *post*dated the Jones Act and did not appear to be a punitive damages case at all. See *McBride* v. *Estis Well Serv., LLC*, 768 F.3d 382, 395-96 (5th Cir. 2014) (en banc) (Clement, J., concurring) (citing *The Rolph*, 293 F. 269 (N.D. Cal. 1923)). Moreover, during the thirty years after the passage of the Jones Act (1920-1950), injured seamen almost exclusively brought Jones Act claims rather than unseaworthiness claims. *Id.* at 397. That choice would have been irrational if unseaworthiness actions permitted punitive damages that Jones Act actions did not. *Ibid.* Thus, there is no basis upon which to conclude that punitive damages were historically available in connection with unseaworthiness claims.[9]

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[9] This Court's statement in *Townsend* that "[h]istorically, punitive damages have been available and awarded in general maritime actions" (557 U.S. at 407) does not suggest that punitive damages were historically available for unseaworthiness claims. *Townsend* was a maintenance-and-cure case, and as this Court has previously recognized, the maintenance-and-cure

Moreover, irrespective of whether punitive damages were available in unseaworthiness cases prior to the Jones Act, it would not make sense to interpret the unseaworthiness doctrine to permit punitive damages in light of the passage of the Jones Act and the close relation between the two causes of action.

Unseaworthiness claims and Jones Act claims—and the remedies available thereunder—have long been closely linked. Congress enacted the Jones Act in response to this Court's decision in *The Osceola*, 189 U.S. 158, 175 (1903), which had held that a seaman was "not allowed to recover an indemnity for the negligence of the master, or any member of the crew." The negligence action brought into being by the Jones Act was thus "an alternative" to a traditional unseaworthiness claim, and a seaman accordingly was entitled to recover under a negligence theory, or an unseaworthiness theory, but not both. *Pac. S.S. Co.* v. *Peterson*, 278 U.S. 130, 138 (1928). That was so, this Court explained, because whether "the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to but *one indemnity by way of compensatory damages*." *Ibid.* (emphasis added) (citation omitted).

The rule requiring a seaman to choose between an unseaworthiness claim and a Jones Act claim has since been abrogated (see *McAllister* v. *Magnolia Pe-*

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cause of action—a contract-based cause of action by which sick or injured seamen can recover expenses while recovering—is "unlike" the "indemnity" created for unseaworthiness. *Aguilar* v. *Standard Oil Co. of N.J.*, 318 U.S. 724, 730 (1943).

troleum Co., 357 U.S. 221, 223 n.2 (1958)), but the two remedies remain closely related. Indeed, in light of the judicial expansion of the unseaworthiness cause of action over the course of the twentieth century, the two remedies now substantially overlap. See G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 383 (2d ed. 1975)). Today, many, if not most, plaintiffs can bring unseaworthiness claims to recover for injuries for which the *only* available remedy at the time of the Jones Act's passage would have been a Jones Act negligence claim. See *McBride*, 768 F.3d at 400-01 (Clement, J., concurring).

In light of the increased overlap between Jones Act and unseaworthiness claims in modern times, the notion that punitive damages may be awarded in connection with unseaworthiness claims is untenable. It has long been established that punitive damages are not available under the Jones Act, because the Jones Act incorporated "unaltered" the remedies available under the Federal Employers Liability Act ("FELA"), which do not include punitive damages. *Miles*, 498 U.S. at 32; see *McBride*, 768 F.3d at 388 ("Because the Jones Act adopted FELA as the predicate for liability and damages for seamen, no cases have awarded punitive damages under the Jones Act."); *Miller* v. *Am. President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) ("Punitive damages are not * * * recoverable under the Jones Act."); *Bergen* v. *F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987), *opinion modified on reh'g*, 866 F.2d 318 (9th Cir.1989) ("Punitive damages are non-pecuniary damages unavailable under the Jones Act."). If the court of appeals were correct that punitive damages *are* available for unseaworthiness claims, which now can effectively replicate Jones Act claims, Congress's intent in the Jones Act to limit seamen's right of re-

covery to compensatory damages would be thwarted by judicial fiat.

Indeed, permitting the recovery of punitive damages in unseaworthiness cases could relegate the Jones Act to near-complete irrelevance. Plaintiffs would have little reason to bring a Jones Act claim, which requires proof of negligence and offers only compensatory relief, if they could bring an unseaworthiness claim, which brings with it the promise of strict liability (*Yamaha*, 516 U.S. at 208) and—as the court below and Washington Supreme Court see it—the potential for punitive damages. Perhaps plaintiffs would continue to join Jones Act claims to unseaworthiness claims in order to ensure that both would be tried to a jury. Cf., *e.g.*, *Fitzgerald* v. *U.S. Lines Co.*, 374 U.S. 16, 21 (1963) (holding that although jury trials are not required in admiralty cases, "a maintenance and cure claim joined with a Jones Act claim must be submitted to the jury when both arise out of one set of facts"). But that outcome—in which the Jones Act would serve, at most, as a vehicle for obtaining a jury trial on a different cause of action—cannot be squared with the "uniform plan of maritime tort law Congress created in * * * the Jones Act." *Miles*, 498 U.S. at 37.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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No. 18-266

In The Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

vs.

CHRISTOPHER BATTERTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONER

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I. INTEREST OF *AMICUS CURIAE*[1]

The Maritime Law Association of the United States (MLA) is a nationwide bar association founded in 1899 and incorporated in 1993. It has a membership of approximately 2,600 attorneys, federal judges, law professors, and others interested in maritime law. It is affiliated with the American Bar Association and is represented in the Association's House of Delegates.

The MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—ship-owners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, stevedoring companies, passengers, marine insurance underwriters and brokers, and other maritime plaintiffs and defendants.

The objectives of the MLA, as stated in its Articles of Incorporation, are to advance reforms in the maritime law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting maritime law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the

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[1] Pursuant to this Court's Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae's* intention to file this brief and have consented to this filing.

American Bar Association, and to act with other associations in efforts to bring about greater harmony in the shipping laws, regulations, and practices of different nations.

To further these objectives, the MLA has sponsored a wide range of legislation dealing with maritime matters and has cooperated with congressional committees in formulating maritime legislation.[2] Similarly, the MLA has assisted with international maritime projects undertaken by the United Nations, the International Maritime Organization, and the Comité Maritime International.

Consistent with its mission to promote uniformity in the interpretation of maritime law, the MLA has appeared as *amicus curiae* in cases that raise substantial questions affecting uniformity.[3] This case creates an irreconcilable split between two of the most active maritime circuit courts concerning the availability and extent of punitive damages under general maritime law.

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[2] *E.g.*, Carriage of Goods by Sea Act, 46 U.S.C. § 30701 *note*; Death on the High Seas Act, 46 U.S.C. §§ 30301-30308; Federal Arbitration Act, 9 U.S.C. §§ 1-16; Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611; Jones Act, 33 U.S.C. § 30104; Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1367; Convention of the International Regulations to Prevent Collisions at Sea, 28 U.S.T. 3459, *as amended*, T.I.A.S. 10672; United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

[3] *E.g.*, *American Triumph LLC v. Tabingo*, 138 S. Ct. 648 (2018); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *United States v. Locke*, 529 U.S. 89 (2000); *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Offshore Logistics, Inc. v. Tallentire*, 447 U.S. 207 (1986); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

The MLA urges the Court to grant certiorari to resolve this conflict and restore uniformity.

II. SUMMARY OF ARGUMENT

The Ninth Circuit's ruling that a vessel owner may be subject to punitive damages in a personal injury suit alleging unseaworthiness directly conflicts with rulings of courts across the nation and, in particular, the Fifth Circuit. This conflict creates substantial uncertainty for maritime actors and those who advise them about the risks and potential exposure presented by litigation, and increases the risk of improper forum shopping. Both parties in such actions must be able to rely on the predictability and uniformity of federal maritime law and the boundaries of federal maritime legislation. The Court's intervention is necessary to mend the split and unify federal maritime law on this important issue.

III. ARGUMENT

A. Conflict Over the Availability of Punitive Damages Under General Maritime Law Destroys Uniformity.

More than a century ago, the Court explained that "[n]o [state] legislation is valid if it . . . works material prejudice to the characteristic features of the general maritime law or if it interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1916). The foundation for

uniformity is derived from our Constitution, which by extending the judicial power of the United States to all cases of maritime jurisdiction, recognizes the danger that patchwork application of maritime law can have on peripatetic maritime commerce. Indeed, a uniform federal maritime law was one of the primary reasons for the exclusive grant of admiralty jurisdiction to the federal courts. *See* 3 Elliot's Debates 532 (Madison) ("If, in any case, uniformity be necessary . . . [the] establishment of one revisionary superintending power can alone secure such uniformity. . . . To the same principles may also be referred their cognizance in admiralty and maritime cases. As our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform.").

To this day, the principle of uniformity is a central tenet of general maritime law, ensuring that maritime law is applied consistently throughout the country in whatever forum it may arise. *See Norfolk Southern Ry. v. Kirby*, 543 U.S. 14, 28 (2004) ("We have explained that Article III's grant of admiralty jurisdiction must have referred to a system of law coextensive with, and operating uniformly in, the whole country."); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 26-27 (1990) (citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970)).

The Ninth Circuit's decision in this case creates an irreconcilable split with the Fifth Circuit as to whether punitive damages are available in a general maritime law claim against a vessel owner for unseaworthiness. The conflict arises out of conflicting interpretations of

Miles, 498 U.S. at 19, and *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009). The Ninth Circuit relied on *Townsend* and found that because punitive damages are available for general maritime law claims for maintenance and cure, punitive damages are also available for unseaworthiness. In *McBride v. Estis Well Serv., LLC*, 768 F.3d 382, 391 (5th Cir. 2014), on the other hand, the Fifth Circuit found that *Miles* controlled and reasoned that because punitive damages were not permitted for personal injury and death claims under the Jones Act, they were similarly not available on a companion unseaworthiness claim. The dispute boils down to whether an unseaworthiness claim is more like a general maritime law claim for maintenance and cure or more like a Jones Act claim for damages.

In addition to the Fifth Circuit, the Ninth Circuit's ruling conflicts with rulings out of the First, Second, and Sixth Circuits, as well as the Texas Supreme Court, all of which have relied on *Miles* and declared that, because the legislature limited damages for a seaman's personal injury claim under the Jones Act to pecuniary losses, punitive damages are similarly not available in an unseaworthiness claim. *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) (holding that "*Miles* mandates the conclusion that punitive damages are not available in an unseaworthiness action under general maritime law"); *Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084, 1094 (2d Cir. 1993) (the "post-*Miles* authority lends additional support" to the Court's conclusion that punitive damages are not

allowed under the general maritime law); *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1455, 1457-1459 (6th Cir. 1993) (relying on *Miles*, the court held that punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296-297 (Tex. 1993) (holding that punitive damages are not available in an unseaworthiness claim involving nonfatal injuries).

The disparity in the availability of punitive damages from one coast to another results in shifting landscapes of liability for vessel owners, many of whom operate in multiple states. Without the Court's intervention, a vessel owner sued for unseaworthiness on the Pacific Coast may face a claim for punitive damages, whereas its exposure on the same claim when filed in Texas, Louisiana or Mississippi would be limited to pecuniary losses. This lack of uniformity directly impacts a vessel owner's business by complicating its ability to develop and implement consistent internal policies, thwarting its ability to obtain universal and consistent insurance, and rendering the ability of its counsel to assess, predict, and minimize risk infinitely more difficult.

The split among the circuit courts on the availability of punitive damages for unseaworthiness creates uncertainties for injured seamen as well. Two injured seamen pursuing damages based upon the same set of facts may be entitled to different categories of damages depending upon the state in which each suit is located.

In addition to making it difficult for both plaintiff and defendant to assess and resolve claims short of litigation, this legal disparity may have the unfortunate effect of encouraging forum shopping. *See* Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 530 LA. L. REV. 529 (2010); Thomas H. Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 172. It is important for this Court to reestablish the predictability and uniformity of maritime law in this area for all those involved in the marine industry.

B. The Court is Responsible for Prescribing Rules for the Assessment of Punitive Damages.

The Court has the authority and responsibility to develop and guide the general maritime law of the nation. It is tasked with prescribing rules for the assessment of punitive damages, including the development of constitutional and common-law guidelines for the review of punitive damages awards. *See, e.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (1998); *Cal. v. Deep Sea Research*, 523 U.S. 491, 501 (1998) ("The federal courts have had a unique role in the admiralty cases since the birth of this Nation, because maritime commerce was . . . the jugular vein of the Thirteen States.").

The Ninth Circuit has not yet reviewed a punitive damages award in this case—it was only asked whether such a remedy was available. Nevertheless, in

following the reasoning of *Townsend*, the Ninth Circuit has at least suggested that it would find appropriate the "willful and wanton" standard for punitive damages articulated by the *Townsend* Court—a *mens rea* that is analytically incompatible with the strict liability nature of an unseaworthiness claim. By granting certiorari, the Court will not only have the opportunity to unify the law, but also to outline guidelines, if necessary, for the lower courts to apply when addressing punitive damages claims in the unique context of an unseaworthiness claim.

IV. CONCLUSION

The MLA respectfully submits that the petition for certiorari should be granted.

Respectfully submitted,

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No. 18-266

IN THE

Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether punitive damages may be awarded to a Jones Act seaman in a personal injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.

CORPORATE DISCLOSURE STATEMENT

The Dutra Group is not aware of any parent corporation or any publicly held company that owns 10% or more of its stock.

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IN THE

Supreme Court of the United States

No. 18-266

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.3d 1089. The order of the district court denying petitioner's motion to strike or dismiss respondent's claim for punitive damages (Pet. App. 17a-21a) is available at 2014 WL 12538172.

JURISDICTION

The court of appeals entered judgment on January 23, 2018. Pet. App. 1a. A petition for rehearing was denied on May 2, 2018. Pet. App. 23a. The petition for a writ of certiorari was filed on August 30, 2018, and was granted on December 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

A. The Evolution Of The Duty Of Seaworthiness

1. General maritime law recognizes that owners and operators of vessels have a duty to ensure that their vessel is seaworthy—that is, fit for its intended voyage. The nature and enforcement of that duty have changed significantly over time, however, and the version of the duty invoked by respondent—a strict-liability duty enforceable in tort suits to recover damages for personal injuries—has existed only since the 1940s. *See Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 25-26 (1990).

Initially, federal judicial decisions and statutes conceived of the duty of seaworthiness as governing only the contractual relationship between seamen and the owners and operators of vessels. If crewmembers proved that a ship was unseaworthy, they had a right to have the ship repaired or to be excused from their employment contract, and to receive lost wages. *See, e.g.*, *Dixon* v. *The Cyrus*, 7 F. Cas. 755 (D. Pa. 1789) (No. 3,930); *The Moslem*, 17 F. Cas. 894 (S.D.N.Y. 1846) (No. 9,875); 1 Stat. 131, § 3 (1790); 5 Stat. 394, 396 ¶¶12, 14 (1840). *See generally Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 544 (1960); Chamlee, *The Absolute Warranty of Seaworthiness: A History and Comparative Study*, 24 Mercer L. Rev. 519, 530-531 (1973).

During the 1800s, American courts imported a second conception of seaworthiness from Europe: an implied warranty running from the vessel's owner or operator to the merchant or shipper. *Mitchell*, 362 U.S. at 544; Chamlee, 24 Mercer L. Rev. at 521-523. Under that version of the duty, a vessel owner or operator had to compensate the merchant or shipper if its freight

was lost or damaged because of the ship's unseaworthiness. Chamlee, 24 Mercer L. Rev. at 522-524; *see, e.g.*, *Putnam* v. *Wood*, 3 Mass. 481, 484 (1807); *Work* v. *Leathers*, 97 U.S. 379 (1878); *The Caledonia*, 157 U.S. 124, 134 (1895). Asserting its "superior authority in [maritime] matters," *Miles*, 498 U.S. at 27, Congress substantially reduced the scope of that warranty. *See* 27 Stat. 145 (1893); *May* v. *Hamburg-Amerikanische Packetfahrt Aktiengesellschaft*, 290 U.S. 333 (1933).

Under general maritime law as it existed through the 1800s, a seaman injured during employment could recover only under a doctrine known as "maintenance and cure." Under that doctrine, vessel owners and operators are obligated to provide wages, food, lodging, and medical treatment to a seaman while he is wounded or ill in the service of the vessel for as long as the voyage continues, whether or not the vessel owner or operator caused the injury or illness. *See Mitchell*, 362 U.S. at 543; *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404, 407-408, 413, 422 (2009); *Harden* v. *Gordon*, 11 F. Cas. 480, 482-483 (D. Me. 1823) (No. 6,047).

"Not until the late nineteenth century did ... it bec[o]me generally accepted that a shipowner was liable [for compensatory damages] to a mariner injured in the service of a ship" where "the owner's failure to exercise due diligence ... render[ed] the ship or her appliances unseaworthy." *Mitchell*, 362 U.S. at 544-545; *see* Chamlee, 24 Mercer L. Rev. at 529. In 1883, a federal court—perhaps for the first time—noted the question whether a shipowner "might be liable in damages [to an injured seaman] ... for [the ship's] unseaworthy condition when sent out of port." *The City of Alexandria*, 17 F. 390, 392-393 (S.D.N.Y. 1883). That court declined to resolve the legal question, however, because it found the ship was seaworthy. *Id.*

This Court arguably recognized unseaworthiness as a basis for personal-injury damages in 1903, when it remarked in *dicta* that "the vessel and her owner are ... liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." *The Osceola*, 189 U.S. 158, 175 (1903);[1] *see Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 99 (1944) ("The [personal-injury] rule seems to have been derived from the seaman's privilege to abandon a ship improperly fitted out ...."); *The Arizona* v. *Anelich*, 298 U.S. 110, 121 n.2 (1936).

For many years, however, the possibility that a seaman might recover damages as compensation for injuries sustained aboard a vessel was highly uncertain. That was so for several reasons. First, an injured seaman could not recover if the vessel's unseaworthiness was caused by the negligence of the crew, under the fellow-servant rule recognized in admiralty. *See Plamals* v. *The Pinar Del Rio*, 277 U.S. 151, 155 (1928); *The Osceola*, 189 U.S. at 175; *The Sachem*, 42 F. 66 (E.D.N.Y. 1890). Second, a seaman could not bring a claim based on negligence generally; to succeed, the claim had to tie the injury to "the unseaworthiness of the ship and her appliances." *The Osceola*, 189 U.S. at 173-175; *see The City of Alexandria*, 17 F. at 392. Fi-

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[1] As this Court and learned commentators noted, the precise meaning of this language in *The Osceola* has long been unclear. *See Mitchell*, 362 U.S. at 546 (Court may have intended "not to broaden the shipowner's liability, but, rather, to limit liability for negligence to those situations where his negligence resulted in the vessel's unseaworthiness"); Gilmore & Black, *The Law of Admiralty* 277 (2d ed. 1975) ("[N]either the facts of the case nor the questions certified required Justice Brown to analyze with care the owner's duty to provide a seaworthy ship").

nally, maritime law did not recognize a cause of action for the wrongful death of a seaman at all. *See The Harrisburg*, 119 U.S. 199, 213-214 (1886).

2. In 1920, Congress acted to ensure a right of recovery for maritime injuries resulting in a seaman's injury or death. The Merchant Marine Act, or the Jones Act as it is typically called, "provides an action in negligence for the death or injury of a seaman." *Miles*, 498 U.S. at 29; *see* 46 U.S.C. § 30104. "[W]ith the passage of the Jones Act ..., Congress effectively obliterated all distinctions between the kinds of negligence for which the shipowner is liable, as well as limitations imposed by the fellow-servant doctrine, by extending to seamen the remedies made available to railroad workers under the Federal Employers' Liability Act" (FELA). *Mitchell*, 362 U.S. at 546-547; *see* 46 U.S.C. § 30104 ("Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."). Because Congress intended the Jones Act to "establish[] a uniform system of seamen's tort law parallel to that available to employees of interstate railway carriers under FELA," Congress "[i]ncorporat[ed] FELA unaltered into the Jones Act," including "[FELA's] substantive recovery provisions" and the judicial "gloss[es]" on those provisions. *Miles*, 498 U.S. at 23, 29, 32.

Congress conceived of the Jones Act remedy as an alternative to the seaman's much less certain cause of action for injuries based on unseaworthiness. A few years after the Jones Act's enactment, this Court explained the Jones Act's relationship to unseaworthiness: "The right to recover compensatory damages under the new rule for injuries caused by negligence"—that is, under the Jones Act—"is ... an alternative of the right to recover indemnity under the old rules on

the ground that the injuries were occasioned by unseaworthiness." *Pacific Steamship Co.* v. *Peterson*, 278 U.S. 130, 138 (1928). "[W]hether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to but one indemnity by way of compensatory damages." *Id.* (citation omitted).[2]

For the next several decades, the tort of unseaworthiness remained "obscure and relatively little used." *Miles*, 498 U.S. at 25 (quotation marks omitted); *see* Gilmore & Black, *The Law of Admiralty* 383 (2d ed. 1975). Negligence actions under the Jones Act were more attractive to plaintiffs for several reasons. Unseaworthiness "embrace[d] certain species of negligence," but the Jones Act "included several additional species not embraced in" unseaworthiness; Jones Act negligence imposed a general duty of care rather than a narrow duty of due care in providing a seaworthy vessel. *See Peterson*, 278 U.S. at 138. In addition, unlike in unseaworthiness actions, the fellow-servant rule was not a defense under the Jones Act. *See Mahnich*, 321 U.S. at 99. And the Jones Act allowed wrongful-death actions (in addition to personal-injury actions), whereas a wrongful-death action could not be based on unsea-

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[2] The Court later disapproved the "suggestion[]" in some cases that a seaman had to "exercise an election between his remedies for negligence under the Jones Act and for unseaworthiness," but reiterated that unseaworthiness and Jones Act negligence are "alternative 'grounds' of recovery for a single cause of action" and therefore "must [be asserted] in a single proceeding." *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 222 n.2, 224-225 (1958).

worthiness under general maritime law. *See Miles*, 498 U.S. at 23-24, 27.

3. The theory of unseaworthiness as a basis for damages liability underwent a "revolution" starting in 1944, when "this Court transformed the warranty of seaworthiness into a strict liability obligation." *Miles*, 498 U.S. at 25; *see Mahnich*, 321 U.S. at 100. "The shipowner became liable for failure to supply a safe ship irrespective of fault and irrespective of the intervening negligence of crew members." *Miles*, 498 U.S. at 25; *see Mahnich*, 321 U.S. at 100; *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 94-95 (1946). In ruling that the fellow-servant rule should not be recognized in a general maritime claim based on unseaworthiness, the Court in *Mahnich* noted the need to align unseaworthiness doctrine with the principles established by Congress in the Jones Act: "It would be an anomaly if the fellow servant rule, discredited by the Jones Act as a defense in suits for negligence, were to be resuscitated and extended to suits founded on the warranty of seaworthiness." 321 U.S. at 102-103.

The Court completed the revolution when it held in *Miles* that an action for the wrongful death of a seaman could be premised on a claim of unseaworthiness. 498 U.S. at 27-30. In *Moragne* v. *States Marine Lines, Inc.*, the Court had already overruled *The Harrisburg*, which had refused to recognize a cause of action for wrongful death under general maritime law. 398 U.S. 375, 399-402 (1970). *Miles* "ma[d]e explicit" that *Moragne*'s holding was not "limit[ed] ... to its facts," which had involved "the situation of longshoremen." *Miles*, 498 U.S. at 27, 30.

Driving the Court's decision in *Miles* was the need to promote coherence between the judicially fashioned

doctrine of unseaworthiness and Congress's legislatively expressed policy decisions in the Jones Act and the Death on the High Seas Act (DOHSA), which had approved the creation of a cause of action for wrongful death occurring in international waters. "Admiralty is not created in a vacuum," 498 U.S. at 24, and now that Congress has "legislated extensively" in maritime areas, "an admiralty court should look primarily to these legislative enactments for policy guidance." *Id.* at 27.

The "legislative judgment behind" the Jones Act and DOHSA, the Court concluded, "created a strong presumption in favor of a general maritime wrongful death action." *Miles*, 498 U.S. at 24. Recognition of wrongful-death actions for unseaworthiness "was not only consistent with the general policy of both 1920 Acts favoring wrongful-death recovery, but also effectuated the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Id.* at 27 (quotation marks omitted).

B. The Scope Of Recovery In Actions Under General Maritime Law

Separate from the recognition of a cause of action under general maritime law is the question of "the scope of the damages recoverable" under that cause of action. *Miles*, 498 U.S. at 30. As to that question, too, the Court has stressed the need to align the judicially developed cause of action for unseaworthiness with the legislative policy judgments reflected in the Jones Act.

1. In *Miles*, after the Court concluded that a wrongful-death action could be brought based on unseaworthiness, it turned to the question whether a plaintiff in such an action could recover for "loss of soci-

ety," and whether a plaintiff in a general maritime survivorship action could recover for "the seaman's lost future earnings." 498 U.S. at 21, 30-36. As it had when it considered whether to recognize a wrongful-death action at all, the Court looked to the Jones Act and FELA for direction on that question.

Starting with lost society, the Court noted that FELA's wrongful-death provision did not permit recovery for non-pecuniary loss. By "[i]ncorporating FELA unaltered into the Jones Act," the Court explained, Congress similarly "limit[ed] recovery [in a parallel Jones Act action] to pecuniary loss." *Miles*, 498 U.S. at 32. Because loss-of-society damages compensate for non-pecuniary loss, they cannot be recovered in wrongful-death actions under the Jones Act. *Id.* at 32. Consequently, the Court held that "the Jones Act ... precludes recovery for loss of society" in actions based on unseaworthiness. *Id.*

Turning next to damages for lost future earnings in a survival action, the Court applied a similar analysis. The Court observed that the Jones Act's "survival provision limits recovery to losses suffered during the decedent's lifetime" because it was already established when the Jones Act was enacted that FELA's survival provision contained such a limitation. *Miles*, 498 U.S. at 36. "The Jones Act/FELA survival provision," therefore, "forecloses" lost future income for any survival actions based on unseaworthiness. *Id.* at 36-37.

The Court explained that when "Congress has spoken directly to the question of recoverable damages" in admiralty, "the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Miles*, 498 U.S. at 31 (quotation marks omitted). A decision by Congress to restrict the scope

of recovery in Jones Act negligence cases must therefore "foreclose[] more expansive remedies in a general maritime action founded on strict liability," *i.e.*, unseaworthiness. *Id.* at 36. The Court acknowledged that admiralty courts have traditionally shown "special solicitude for the welfare of seamen and their families." *Id.* But, the Court stressed: "We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Id.* On the contrary, the Court explained, "[i]t would be inconsistent with our place in the constitutional scheme, were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence" under the Jones Act. *Id.* at 32-33; *see also id.* at 37.

2. In *Atlantic Sounding Co.* v. *Townsend*, the Court considered a different question: "whether an injured seaman may recover punitive damages for his employer's willful failure to pay maintenance and cure." 557 U.S. at 407. Unlike the duty to provide a seaworthy vessel—which, as explained above, developed into a strict-liability tort action only 75 years ago and which has long been viewed as a twin of Jones Act negligence—"the legal obligation to provide maintenance and cure dates back centuries" and is "separate" from Jones Act negligence. *Id.* at 413, 415; *see also Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 527 (1938) (duty of maintenance and cure is "ancient").

The Court began with the premise that "the common-law tradition of punitive damages extends to maritime claims." *Townsend*, 557 U.S. at 414. Next, the Court found "no evidence that claims for maintenance

and cure were excluded from this general admiralty rule." *Id.* at 414-415. Thus, the key question was whether "Congress has enacted legislation departing from this common-law understanding." *Id.* at 415. The only statutory candidate was the Jones Act, and the Court concluded that that the Jones Act "did not eliminate pre-existing remedies available to seamen for the separate common-law cause of action based on a seaman's right to maintenance and cure." *Id.* at 415-416.

The Court also rejected the defendant's argument that "the availability of punitive damages [for maintenance and cure] is controlled by the Jones Act because of this Court's decision in *Miles*." *Townsend*, 557 U.S. at 418. Although the Court emphasized that "[t]he reasoning of *Miles* remains sound," it explained that *Miles* had "not address[ed] either maintenance and cure actions in general or the availability of punitive damages for such actions." *Id.* at 418-421. It was "possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act," the Court said, because "[u]nlike the situation presented in *Miles*, both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act." *Id.* at 420-421. And unlike unseaworthiness, maintenance and cure "is 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under' the Jones Act." *Id.* at 424 (alterations omitted) (quoting *Peterson*, 278 U.S. at 139). "[T]he seaman may have maintenance and cure and also one of the other two," *i.e.*, Jones Act negligence or unseaworthiness. *Id.* (quotation marks omitted).

C. The Proceedings Below

Petitioner provides dredging services and marine construction services and materials. Respondent alleges that while working for petitioner aboard a dredging vessel in August 2014, he was injured when a hatch cover blew open. Pet. App. 17a-18a.

Respondent sued in the Central District of California, asserting three claims: negligence under the Jones Act, breach of the duty of seaworthiness, and breach of the duty of maintenance and cure. Pet. App. 2a-3a, 18a. He sought compensatory damages on all his claims, but sought punitive damages only on his unseaworthiness claim. First Am. Compl. (ECF No. 11) ¶17, Prayer for relief.

Petitioner moved to strike or dismiss respondent's punitive damages claim on the ground that punitive damages are not available in unseaworthiness actions. The district court denied that motion but certified the issue for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 21a, 32a.

The Ninth Circuit affirmed, and held that punitive damages are "awardable to seamen for their own injuries in general maritime unseaworthiness actions." Pet. App. 15a. The court followed circuit precedent on that point, which, it concluded, had not been overruled by *Miles*. Indeed, the court of appeals believed that this case was closer to *Townsend* than to *Miles*. According to the court, in *Townsend* this Court had determined that punitive damages are broadly available under general maritime law, Pet. App. 4a-5a, 14a, whereas *Miles* "did not address punitive damages," Pet. App. 10a, 13a.

The court acknowledged that *Townsend* "leaves room for a distinction between maintenance and cure claims and unseaworthiness claims." Pet. App. 5a. But the court nonetheless found no useful guidance in *Miles*, even though that decision had directly addressed unseaworthiness claims. Despite the extensive discussion in *Miles* about the need to conform remedies under the judge-made unseaworthiness action to those available under the Jones Act, *see* 498 U.S. at 32-33, the court of appeals read *Miles* to concern only the narrow question whether compensatory damages for unseaworthiness are limited to pecuniary loss. Pet. App. 12a-15a. And the court found it "not apparent why barring damages for loss of society should also bar punitive damages." Pet. App. 13a. Because punitive damages "are not compensation for loss at all," the court concluded that *Miles* did not inform the question in this case, and it affirmed the denial of petitioner's motion to strike the claim for punitive damages. Pet. App. 14a-15a.

SUMMARY OF ARGUMENT

Punitive damages are not available in claims for unseaworthiness brought under general maritime law. Congress has exercised its superior constitutional authority to regulate maritime activity by enacting the Jones Act, which provides a cause of action if a seaman is injured or killed by the employer's negligence. As the Court made clear in *Miles* v. *Apex Marine, Inc.*, 498 U.S. 19 (1990), and other cases, due respect for the constitutional separation of powers compels the courts to heed any limitations Congress set on Jones Act negligence actions when they exercise their admiralty powers to fashion remedies for the closely related action of unseaworthiness under general maritime law. Moreo-

ver, the Constitution compels the courts to maintain the uniformity of maritime law. In *Miles*, these constitutional imperatives led the Court to conclude that the Jones Act's bar on non-pecuniary damages in negligence actions applied equally in unseaworthiness actions. Here, the same principles dictate that the Jones Act's bar on punitive damages also bar punitive damages in unseaworthiness actions. As was the case in *Miles*, to hold otherwise would allow the general maritime law developed by the courts to supersede the legislative judgments of Congress.

This Court's more recent decision in *Townsend* does not change the applicability of *Miles* to this case or the outcome that *Miles* compels. By its own terms, *Townsend* applies to maintenance and cure actions, not unseaworthiness actions, and *Townsend* affirms that the rule established in *Miles* continues to be good law. *Townsend* rightly recognized that *Miles*'s different approach was appropriate for unseaworthiness actions: unseaworthiness as it exists today is an alternative of Jones Act negligence that was judicially created after the Jones Act's enactment, whereas maintenance and cure is a separate and ancient doctrine. Thus, judicial expansion of the remedies in maintenance and cure beyond those provided in the Jones Act does not implicate the constitutional imperatives that drove the Court's analysis in *Miles* nearly as much as does judicial expansion of the remedies in unseaworthiness actions.

Furthermore, there is no sound basis for limiting the *Miles* framework only to wrongful-death claims or to the question of whether non-pecuniary damages are available. *Miles*'s reasoning has equal force with respect to personal-injury claims and other types of damages, including punitive damages. Under *Miles*, the scope of recovery in unseaworthiness actions must

yield to Congress's superior judgments regarding the limitations on recovery under the Jones Act, whether the seaman was injured or killed.

But even if this Court were not compelled by its precedent to hold that punitive damages are not available in unseaworthiness actions, such a rule would still be the appropriate course of action. Unlike maintenance and cure actions, there is no history of punitive damages being available in unseaworthiness actions. Allowing recovery of punitive damages in unseaworthiness actions would also have significant adverse consequences on the maritime industry.

ARGUMENT

I. THE IMPERATIVES OF DEFERENCE TO CONGRESSIONAL JUDGMENT AND UNIFORMITY IN MARITIME LAW PRECLUDE PUNITIVE DAMAGES IN UNSEAWORTHINESS ACTIONS

A. Congress's Decision To Bar Punitive Damages In Jones Act Negligence Actions Bars Such Damages In Unseaworthiness Actions Brought By Seamen

As was true in *Miles* v. *Apex Marine Corp.*, the Court here "sail[s] in occupied waters." 498 U.S. 19, 38 (1990). The Jones Act expresses Congress's decision that seamen injured aboard a vessel may recover damages to compensate for their loss, but not punitive damages. Time and again, the Court has emphasized the need to defer to congressional judgments of that sort in admiralty cases, because of the importance of respect to legislative policy judgments and the need for uniformity in maritime liability rules. Those considerations point decisively toward the answer to the ques-

tion presented in this case: Punitive damages are not available in unseaworthiness actions brought by Jones Act seamen.

Miles instructs that any "limits" Congress has placed on the scope of recovery in negligence actions under the Jones Act "foreclose[] more expansive remedies in a general maritime action founded on strict liability," *i.e.*, unseaworthiness. 498 U.S. at 36. That rule follows from dual constitutional imperatives: the separation of powers and the uniformity of maritime law. First, "Congress retains superior authority in [maritime] matters." *Id.* at 27. Therefore, "[i]t would be inconsistent with [the Court's] place in the constitutional scheme were [it] to sanction more expansive remedies in a judicially created cause of action in which liability is without fault"—that is, unseaworthiness as it exists after its 1944 revolution—"than Congress has allowed" for negligence actions under the Jones Act. *Id.* at 32. Second, the Constitution "mandate[s]" that there be "uniform rule[s] applicable to all actions" for a given injury, "whether under ... the Jones Act[] or general maritime law." *Id.* at 27, 33; *see also Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 624-625 (1978) (in an unseaworthiness case, stressing need to defer to Congress's judgment in DOHSA that damages for loss of society should not be recoverable); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 393-397 (1970) (looking to Jones Act and DOHSA for guidance whether wrongful-death claim should be available on unseaworthiness theory); *cf. McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 224-226 (1958) (courts "cannot apply" to unseaworthiness actions "a shorter period of limitations than Congress has prescribed for" Jones Act negligence).

Straightforward application of these principles leads to the conclusion that punitive damages are not available in this case. In the Jones Act, Congress did not allow the recovery of punitive damages in negligence actions. The Jones Act therefore "precludes" recovery of punitive damages in unseaworthiness actions as well. *Miles*, 498 U.S. at 32.

1. There can be no serious dispute that punitive damages are not available in a Jones Act negligence case, whether for personal injuries or for death.[3]

As *Miles* noted, Congress "[i]ncorporat[ed] FELA unaltered into the Jones Act." 498 U.S. at 32; *see* 46 U.S.C. § 30104 ("Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."). Specifically, the Jones Act incorporated "the substantive recovery provisions of the older FELA" and existing "gloss[es]" that this Court had rendered on those provisions. *Miles*, 498 U.S. at 32.

"It has been the unanimous judgment of the courts"—including this Court—"since before the enactment of the Jones Act that punitive damages are not recoverable under the Federal Employers' Liability Act." *Miller* v. *American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993). By 1920, when the Jones Act was enacted, this Court had established that the purpose of FELA is compensatory. *See, e.g., St. Louis, I.M. & S.R. Co.* v. *Craft*, 237 U.S. 648, 657-658 (1915) (recovery under FELA is "confined to ... loss

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[3] Indeed, petitioner did not even request punitive damages for the Jones Act negligence claim in his complaint—suggesting he recognizes that they are not available for that claim.

and suffering").[4] Because punitive damages are, by definition, not compensatory of loss, punitive damages are not available in actions under FELA.[5]

This Court has never suggested that punitive damages are available under FELA. On the contrary, the Court recognized that punitive damages are not available in a pre-Jones Act case, *Seaboard Air Line Railway* v. *Koennecke*, 239 U.S. 352 (1915). Reviewing a wrongful-death complaint brought by heirs of a railroad worker that was ambiguous as to the source of the cause of action, the Court observed that "[i]f [the complaint] were read as manifestly demanding exemplary damages" (*i.e.*, punitive damages), "that would point to the state law" rather than FELA as the basis for the claim. *Id.* at 354; *see also Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404, 427-428 (2009) (Alito, J., dissenting). Since enactment of the Jones Act, courts have

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[4] *See also Michigan Cent. R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65, 69-71 (1913) (FELA provides right to "recover[] such damages as would ... compensate[]" for loss); *Gulf, Colo., & Santa Fe Ry. Co.* v. *McGinnis*, 228 U.S. 173, 175 (1913) (recovery under FELA "must ... be limited to compensating those ... as are shown to have sustained some pecuniary loss"); *American R.R. Co. of Porto Rico* v. *Didricksen*, 227 U.S. 145, 149 (1913) ("The damage [under FELA] is limited strictly to the financial loss thus sustained").

[5] *See, e.g., Restatement (Second) of Torts* § 908 (1979) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."); *Lake Shore & M.S. Ry. Co.* v. *Prentice*, 147 U.S. 101, 107 (1893) ("Exemplary or punitive damages [are] awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others ....").

continued to conclude that punitive damages are not permitted under FELA.[6]

This "well established" pre-Jones Act "gloss on FELA"—that compensatory damages are available but punitive damages are not—was incorporated into the Jones Act. *Miles*, 498 U.S. at 32. In fact, the scope of recovery under FELA and thus under the Jones Act does not even include all compensatory damages, as this Court held in *Miles*. *See id.* at 31-32 (plaintiff could not recover non-pecuniary damages in a wrongful-death action). But for present purposes, the salient fact is that *only* compensatory damages may be obtained under the Jones Act. Therefore, as lower courts have uniformly held, "[p]unitive damages are not ... recoverable under the Jones Act." *Miller*, 989 F.2d at 1457; *see, e.g.*, *McBride* v. *Estis Well Serv., L.L.C.*, 768 F.3d 382, 388 (5th Cir. 2014) (en banc) ("no cases have awarded punitive damages under the Jones Act"); *Kopczynski* v. *The Jacqueline*, 742 F.2d 555, 560-561 (9th Cir. 1984) (punitive damages "may not be awarded on a claim of negligence based on the Jones Act"); *see also Townsend*, 557 U.S. at 428 (Alito, J., dissenting).

2. It follows under *Miles* that punitive damages are not available in unseaworthiness actions, either. Just a few years after the Jones Act was enacted, this Court recognized that negligence under the Jones Act and unseaworthiness under general maritime law are

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[6] *See, e.g.*, *Miller*, 989 F.2d at 1457; *Wildman* v. *Burlington N. R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987) ("[P]unitive damages are unavailable under the FELA."); *Kozar* v. *Chesapeake & O. Ry. Co.*, 449 F.2d 1238, 1242-1243 (6th Cir. 1971) (noting that "there is not a single case since the enactment of FELA in 1908 in which punitive damages have been allowed" and holding that "punitive damages are not recoverable under FELA").

simply two paths to *compensation* for the same injury. In *Pacific Steamship Co.* v. *Peterson*, the Court observed: "The right to recover *compensatory damages* under the new rule for injuries caused by negligence"—that is, Jones Act negligence—"is ... an alternative of the right to *recover indemnity* under the old rules on the ground that the injuries were occasioned by unseaworthiness." 278 U.S. at 137-139 (1928) (emphasis added). Whichever cause of action is invoked, the Court added, "there is but a single wrongful invasion of [the seaman's] primary right of bodily safety and but a single legal wrong, for which he is entitled to but one indemnity by way of compensatory damages." *Id.* at 138 (citation omitted).

A contrary rule would contradict the principles this Court followed in *Miles*, *Higginbotham*, and *Moragne*. Congress's judgments about the availability and scope of remedies for seamen who are killed or injured aboard a vessel should be applied to actions based on unseaworthiness because of the Court's respect for its proper constitutional role and the need to maintain a uniform system of maritime law. Allowing punitive damages in unseaworthiness actions would improperly "expand" the remedies that Congress has decided are appropriate when a seaman is injured or killed aboard a vessel. *Miles*, 498 U.S. at 31, 36. It would also "create an unwarranted inconsistency" in admiralty law, where the damages available would differ for the same injury resulting from the same conduct simply based on which liability label was applied. *Id.* at 26, 30, 33.

As the Court explained in *Higginbotham*, where it rejected an argument similar to the one respondent presents here (there, that loss-of-society damages should be available on unseaworthiness claims for passengers on the high seas, even though Congress had

not allowed such damages under DOHSA), "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." 436 U.S. at 625. Indeed, were the Court to allow punitive damages for seamen in unseaworthiness cases, it would not be just rewriting the Jones Act's rules on damages; it would be essentially eliminating the Jones Act altogether. If punitive damages were available for unseaworthiness claims but not Jones Act claims, the Jones Act negligence cause of action would fall quickly into desuetude. In articulating the scope of recovery in unseaworthiness cases, the Court should follow "a process of accommodation with [congressional] statutes, not their abrupt and near-total forced [o]bsolescence." *Sea-Land Servs., Inc.* v. *Gaudet*, 414 U.S. 573, 602 (1974) (Powell, J., dissenting).

B. *Townsend*'s Holding That Punitive Damages Are Available In Maintenance And Cure Actions Does Not Control This Case

Notwithstanding this Court's conclusion in *Miles* that the scope of recovery in unseaworthiness cases should not exceed the remedies available under the Jones Act, the court of appeals believed that this case was controlled by *Townsend*, which held that punitive damages are available for the willful refusal to provide maintenance and cure. The court of appeals read *Townsend* to have adopted a broad presumption that punitive damages are available in actions under general maritime law unless there is clear congressional intent to bar punitive damages, and to have found that the

Jones Act does not express such an intent. That conclusion ignores the unanimous "reasoning" of *Miles*, which, this Court emphasized in *Townsend*, "remains sound." 557 U.S. at 420.

The appellate court's fundamental error was not apprehending two distinctive features of the doctrine of unseaworthiness, which make clear that the framework of *Miles*, not *Townsend*, governs this case. First, unseaworthiness is an alternative cause of action to Jones Act negligence; maintenance and cure is not. Second, the modern cause of action for unseaworthiness—a broad strict-liability regime—was created by the courts after the Jones Act's enactment, whereas the duty to provide maintenance and cure dates back centuries. Because of those differences, the dual imperatives of judicial respect for Congress's judgments and uniformity in maritime law have much more force with respect to unseaworthiness actions.

1. As this Court has recognized repeatedly since the Jones Act was enacted, unseaworthiness and Jones Act negligence are "alternative ... right[s]" to recover for the same injury caused by the same accident. Whichever is invoked, "there is but a single wrongful invasion of [the seaman's] primary right of bodily safety and but a single legal wrong for which he is entitled to but one indemnity by way of compensatory damages." *Peterson*, 278 U.S. at 138-139 (citation omitted); *see McAllister*, 357 U.S. at 225 (unseaworthiness and Jones Act negligence are "alternative 'grounds' of recovery for a single cause of action"); *Townsend*, 557 U.S. at 424 ("the seaman may have ... one of the ... two": unseaworthiness or Jones Act negligence (quotation marks omitted)); Gilmore & Black, *The Law of Admiralty* 383 (2d ed. 1975) ("The Jones Act count and

the unseaworthiness count ... derive from the same accident and look toward the same recovery.").

That is not true of maintenance and cure, which has different origins. Unlike unseaworthiness, "the maintenance and cure right is 'in no sense ... an alternative of[] the right to recover compensatory damages' under the Jones Act," and thus "the seaman may have maintenance and cure *and* also one of the other two"—a recovery for Jones Act negligence or unseaworthiness. *Townsend*, 557 U.S. at 423-424 (quoting *Peterson*, 278 U.S. at 138 and Gilmore & Black, *supra*, at 281) (emphasis added; quotation marks omitted).

Maintenance and cure is not an "indemnity" for an injury suffered by a seaman attributable to a wrong by the vessel owner or operator, as the Court has referred to the action for unseaworthiness. *See Peterson*, 278 U.S. at 138. It "does not rest upon negligence or culpability on the part of the owner or master, nor is it restricted to those cases where the seaman's employment is the cause of the injury or illness." *Calmar*, 303 U.S. at 527 (citations omitted). Further, "[i]t is not an award of compensation for the disability suffered." *Id.* at 528. Rather, it is an obligation of support running from the vessel owner to the seaman whenever the mariner is hurt or becomes ill, whatever its cause: "[T]he shipowner is liable for any injury which occurs or any illness which manifests itself while the seaman is under articles." Gilmore & Black, *supra*, at 281.

These points make clear that remedies for unseaworthiness should be governed by the principles of deference to congressional policy decisions and uniformity in maritime law that were outlined in *Miles*, *Higginbotham*, and *Moragne*, rather than the Court's decision on maintenance and cure in *Townsend*. Fashioning

remedies for an unseaworthiness claim directly implicates Congress's judgments in the Jones Act in a way that remedies for a claim for maintenance and cure do not.

To be sure, in distinguishing *Miles*, the Court in *Townsend* noted that *Miles* had not involved a request for punitive damages. *See Townsend*, 557 U.S. at 420. But the Court did not focus on the type of damages sought divorced from the underlying cause of action. Rather, what mattered, the Court said, was that "unlike the facts presented by *Miles*, the Jones Act does not address maintenance and cure or *its* remedy." *Id.* (emphasis added).

The Jones Act, by contrast, most certainly does address unseaworthiness and its remedies, as *Miles* made plain. Indeed, the Jones Act was enacted to resolve many of the principal deficiencies in unseaworthiness doctrine as it had developed in the late nineteenth century, which had left many seamen without a reliable remedy for injuries sustained aboard a vessel. *See* pp. 5-7, *supra*. In the Jones Act, Congress left untouched the federal courts' admiralty authority to develop the law concerning remedies for the failure to provide maintenance and cure. But quite the opposite is true for unseaworthiness, as to which Congress said, "[T]his much and no more," and "[a]n admiralty court is not free to go beyond those limits." *Miles*, 498 U.S. at 24.

2. The modern strict-liability cause of action for unseaworthiness emerged only in the 1940s, well after Congress expressed its judgments about the scope of recovery for injured seamen in the Jones Act. Although some cases, including *The Osceola*, had recognized damages claims for unseaworthiness before the Jones Act was enacted, the doctrine of unseaworthiness

experienced a "revolution" after passage of that law, in which unseaworthiness was "transformed ... into a strict liability obligation" (without a fellow-servant defense). *Miles*, 498 U.S. at 25. Because of that "radical change," unseaworthiness went from an "obscure and relatively little used" cause of action to "the principal vehicle for recovery by seamen for injury or death." *Id.* at 25-26 (quotation marks omitted).

That history again marks unseaworthiness as quite different from maintenance and cure, taking this case outside the analytical framework the Court followed in *Townsend*. In *Townsend*, the Court noted that punitive damages had been awarded before the Jones Act for some maritime torts, just as they had been awarded for similar torts on land. *See* 557 U.S. at 411-412 (discussing punitive damages on claims for false arrest, trespass, assault, and illegal capture). The Court also noted that two cases predating the Jones Act had awarded punitive damages for the vessel owner's willful failure to provide maintenance and cure. *See id.* at 414 (discussing *The City of Carlisle*, 39 F. 807 (D. Or. 1889), and *The Troop*, 118 F. 769 (D. Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904)). And in distinguishing *Miles*, the Court stressed that the contours of the cause of action for maintenance and cure "were well established before the passage of the Jones Act." *Id.* at 420.

Unlike unseaworthiness, maintenance and cure did not undergo a post-Jones Act revolution at all, let alone one that made it an attractive alternative for Jones Act negligence. Rather, "the legal obligation to provide maintenance and cure dates back centuries." *Townsend*, 557 U.S. at 413; *see also Calmar*, 303 U.S. at 527 (duty of maintenance and cure is "ancient"). Allowing punitive damages in actions for maintenance and cure therefore does not present the risk of the Court's ex-

ceeding its constitutional role by displacing Congress's judgment about the scope of recovery for a seaman's injury or death caused by an accident.

Judicial recognition of punitive damages in unseaworthiness actions would improperly displace Congress's judgment about the scope of remedies for a seaman's injury sustained in the course of his employment. As detailed below, there is no history of punitive damages being allowed in unseaworthiness actions before the Jones Act. *See* pp. 30-33, *infra*. But in any event, allowing punitive damages in such actions would render Congress's decision to bar them in parallel Jones Act negligence actions "'meaningless.'" *Miles*, 498 U.S. at 31 (quoting *Higginbotham*, 436 U.S. at 625). The same cannot be said of allowing punitive damages in maintenance and cure actions.

C. The Framework Of *Miles* Applies Fully To Cases Involving Personal Injury And Punitive Damages

The facts of *Miles* involved claims for loss of society and lost future earnings as a remedy for a seaman's wrongful death. The court of appeals and respondent have suggested that the concerns of uniformity and deference to congressional judgments emphasized in that decision have less application to cases like this one, either because the plaintiff here was injured but not killed, or because punitive damages are supposedly not implicated by the limitation of compensatory damages to pecuniary loss that Congress enacted in FELA and the Jones Act. Neither argument has merit.

1. *Miles* cannot be distinguished on the ground that it involved a claim for wrongful death rather than personal injuries. Unseaworthiness and Jones Act neg-

ligence are alternative remedies for the same incident, regardless of the resulting condition of the seaman. As the Court recognized in *Miles*, "the Jones Act provides an action in negligence for the *death or injury* of a seaman." *Miles*, 498 U.S. at 29 (emphasis added); *see* 46 U.S.C. § 30104 ("seaman injured ... or if the seaman dies"). The doctrine of unseaworthiness likewise provides a remedy for both personal injuries and wrongful death. *See* pp. 2-7, *supra*. Judicial expansion of the remedies for unseaworthiness beyond those for Jones Act negligence therefore creates legal inconsistency and oversteps the limits Congress has set, whether or not the seaman dies from the accident. Indeed, although *Miles* involved a wrongful-death claim, the Court indicated its awareness that the principles underlying its analysis applied equally to personal-injury claims: "We will not create, under our admiralty powers, a remedy ... that goes well beyond the limits of Congress' ordered system of recovery for seamen's *injury and death*." 498 U.S. at 36 (emphasis added).

It does not matter that the FELA/Jones Act bar on compensatory damages for non-pecuniary harms may apply only in wrongful-death actions, and not personal-injury cases.[7] That difference is simply a function of the scope of damages under those statutes, and stems from certain idiosyncrasies relating to the way in which courts determined what constituted a compensable loss for personal injuries, as opposed to wrongful death.

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[7] *See Michigan Cent. R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65 (1913) (suggesting that, under FELA, the employee's suffering may be compensable in personal-injury actions, even though only pecuniary loss is compensable in wrongful-death actions); *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 549-550 (1994) ("damages for negligent infliction of emotional distress are cognizable under FELA").

See, e.g., *Miles*, 498 U.S. at 32; *Michigan Cent. R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65, 68 (1913). That the particular damages limitation at issue in *Miles* applies only in wrongful-death actions does not diminish the more fundamental lesson of *Miles* that FELA/Jones Act damages limitations constrain the scope of recovery in unseaworthiness actions.

And as noted above, the courts have consistently recognized that punitive damages are not available under FELA and the Jones Act at all. *See pp.*17-19 & n.6, *supra*. Indeed, this Court and the circuit courts have specifically acknowledged that the scope of recovery under FELA and the Jones Act is limited to compensation for loss even in personal-injury actions. *See St. Louis*, 237 U.S. at 656 (FELA "invests the injured employee ... with a right to such damages as will be reasonably compensatory for the loss"); *Vreeland*, 227 U.S. at 65, 69-71 (under FELA, "[i]f [employee] had survived he might have recovered such damages as would have compensated him for his expense, loss of time, suffering, and diminished earning power."); *McBride*, 768 F.3d at 388 ("No case under FELA has allowed punitive damages, whether for personal injury or death" and "no cases have awarded punitive damages under the Jones Act."); *Kopczynski*, 742 F.2d at 560-561 (Jones Act); *see also Townsend*, 557 U.S. at 428 (Alito, J., dissenting)). Given that uniform case law, *Miles*'s reasoning requires the same result in all unseaworthiness actions, whether for personal injury or for wrongful death.

The contrary position—allowing seamen to recover punitive damages for personal injuries but not wrongful death—has little to recommend it. As the Jones Act explicitly recognizes, seamen do not die from accidents spontaneously; they "die[] *from the injury*." 46 U.S.C.

§ 30104. Sometimes, a substantial amount of time will elapse between the injury and the resulting death. A plaintiff's entitlement to punitive damages, and a defendant's liability for them, should not depend on the vagaries of whether an injury eventually results in the seaman's death. It makes even less sense that a seaman's death—the more serious outcome—would *terminate* the potential for punitive damages that would be available for his personal injuries. Adopting that position would return maritime law to a regime in which actions for wrongful death are afforded more limited remedies than those for personal injury—a distinction that was "unjustified in reason" or "public policy." *Moragne*, 398 U.S. at 378-379, 381-383, 388-390, 405.

2. Nor can *Miles* be distinguished, as the court of appeals thought, on the ground that it only addressed which types of compensatory damages are available. *See* Pet. App. 12a-15a. The rationale of *Miles* is not so narrow. It makes no sense to read *Miles* to mean that the Jones Act's damages limitations apply only with respect to a very narrow category of damages—compensatory damages for non-pecuniary loss—but otherwise leave the courts free to develop other remedies in unseaworthiness actions, including punitive damages.

The principles that drove the Court's decision in *Miles* have equal force beyond the narrow question whether damages are available for non-pecuniary harms. Indeed, in *Miles* itself, the Court applied those principles to conclude that the Jones Act precluded a type of compensatory damages for *pecuniary* loss: lost future income in a survival suit. *See* 498 U.S. at 34-36. Thus, *Miles* recognized that these principles have general application to unseaworthiness actions, and nothing suggests that they suddenly recede when punitive

damages are sought. The Jones Act expresses Congress's judgment about punitive damages as well, and so, under *Miles*, the courts must equally respect that judgment.

II. Even If This Court Were Not Constrained By Congress's Judgments, It Should Not Allow Punitive Damages In Unseaworthiness Actions

Even if the Court were not constrained by Congress's judgments about appropriate remedies, it should still conclude that punitive damages are not available in unseaworthiness actions. In considering whether to exercise its admiralty powers to authorize punitive damages in unseaworthiness cases, the Court should consider, as it did in *Townsend*, whether there is "evidence that claims for [unseaworthiness] were excluded from th[e] general admiralty rule" allowing punitive damages, and whether "Congress has enacted legislation departing from this common-law understanding." 557 U.S. at 414-415. And the Court should consider the adverse consequences for maritime commerce and national security of allowing punitive damages, which have long been criticized for their potential for overdeterrence. All those factors counsel against allowing punitive damages for unseaworthiness.

A. There Is No Established History Of Punitive Damages In Unseaworthiness Actions

In *Townsend*, the Court observed that, even before Congress passed the Jones Act, admiralty courts had awarded punitive damages for a variety of maritime torts that were analogous to land-based torts, and had also awarded punitive damages when a seaman was maliciously denied his right to maintenance and cure. *See* 557 U.S. at 411-414. Here, by contrast, there is no

established pre-Jones Act history of punitive damages being awarded in unseaworthiness actions. That is hardly surprising, given that the cause of action for unseaworthiness as it exists today—a strict-liability tort—did not take shape until after the Jones Act was enacted, and unseaworthiness as a tort cause of action did not emerge at all until the end of the nineteenth century (unlike maintenance and cure, which arose as a cause of action long earlier). *See* pp. 7-8, *supra*.

None of the decisions respondent has cited (Br. Opp. 16-17 & n.6) is to the contrary. *The Rolph* was a post-Jones Act case that awarded damages as "compensation" for the injured seaman without mentioning punitive damages or otherwise indicating that punitive damages were available. 293 F. 269, 271-272 (N.D. Cal. 1923), *aff'd*, 299 F. 52 (9th Cir. 1924); *see Townsend*, 557 U.S. at 431 (Alito, J., dissenting). As this Court noted in *Townsend*, the damages awarded in *The City of Carlisle*, 39 F. 807, and *The Troop*, 118 F. 769, insofar as they had "some punitive element," were based on the breach of the duty of maintenance and cure, not unseaworthiness. 557 U.S. at 414; *see The City of Carlisle*, 39 F. at 816-817 ("damages for the gross neglect and mistreatment [the seaman] received after the injury"); *The Troop*, 118 F. at 770-773 (damages for "captain's malpractice" with respect to treatment of seaman's injuries).[8]

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[8] In *Townsend*, the Court also cited an article surveying the award of punitive damages in admiralty. 557 U.S. at 412 (citing Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Comm. 73, 115 (1997)). That article provides not a single example of an award of punitive damages for unseaworthiness claims prior to enactment of the Jones Act.

Thus, unlike in *Townsend*, where the Court would have had to conclude that the Jones Act took away a pre-existing remedy of punitive damages to rule for the shipowner in that case, the same is not true here; there was no remedy of punitive damages for unseaworthiness claims before 1920. Unlike *Townsend* itself, therefore, this case does not implicate the Court's observation that the Jones Act "did not eliminate pre-existing remedies to seamen." 557 U.S. at 415-416. Before 1920, seamen did not have the remedy of punitive damages in unseaworthiness cases, and so there was nothing for Congress to take away.

By contrast, Congress has clearly indicated its intent to reject any common-law rule that would allow punitive damages for a breach of the duty of unseaworthiness. Specifically, Congress enacted the Jones Act to provide a remedy for a seaman's accidental injury or death suffered while employed aboard a vessel. *See, e.g., Moragne*, 398 U.S. at 397-398. In doing so Congress limited the scope of recovery to compensatory damages, disallowing punitive damages. *See* pp. 5-7, *supra*.

Only a few appellate cases have ever recognized the availability of punitive damages in unseaworthiness actions, and all were decided in the 1970s and 1980s—decades after the Court's reinvigoration of unseaworthiness in *Mahnich*.[9] In none of those cases did the court identify a "tradition" of punitive damages in unseaworthiness actions, *Townsend*, 557 U.S. at 414-415,

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[9] *See Evich* v. *Morris*, 819 F.2d 256, 258 (9th Cir. 1987); *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987); *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981); *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972) (dicta).

or grapple with the special relationship between unseaworthiness and Jones Act negligence that gives force to the constitutional imperatives endorsed in *Miles*. *See McBride*, 768 F.3d at 395-401 (Clement, J., concurring).

Moreover, this post-enactment era of punitive damages in unseaworthiness actions passed swiftly. As appellate courts consistently concluded, this Court's 1990 decision in *Miles* effectively overruled those cases and foreclosed punitive damages for unseaworthiness.[10] Not until the Washington Supreme Court's 2017 decision in *Tabingo* v. *American Triumph LLC*, 391 P.3d 434 (Wash. 2017), *cert. denied*, 138 S. Ct. 648 (2018), were punitive damages recognized again in unseaworthiness actions. In sum, the late, ephemeral period in which a few lower courts issued poorly reasoned opinions allowing punitive damages in unseaworthiness actions does not establish the kind of historical recognition that the Court identified in *Townsend*. *Cf.* 557 U.S. at 414.

B. Allowing Punitive Damages In Unseaworthiness Actions Could Have Serious Adverse Consequences

Finally, to the extent the Court believes it remains free as an admiralty court to decide whether to authorize punitive damages in unseaworthiness cases—

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[10] *Guevara* v. *Maritime Overseas Corp.*, 59 F.3d 1496, 1507 (5th Cir. 1995), *abrogated on other grounds by Townsend*, 557 U.S. 404; *see also McBride*, 768 F.3d at 388-389 (plurality); *Horsley* v. *Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Miller*, 989 F.2d at 1455, 1457-1459; *Wahlstrom* v. *Kawasaki Heavy Indus. Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993); *Penrod Drilling Corp.* v. *Williams*, 868 S.W.2d 294, 296-297 (Tex. 1993); *Sky Cruises Ltd.* v. *Andersen*, 592 So. 2d 756, 756 (Fla. Dist. Ct. App. 1992) (per curiam).

notwithstanding Congress's expressed policy judgment against such damages in the Jones Act and the lack of historical practice supporting such damages—the Court should give substantial weight to the adverse consequences of punitive damages for maritime commerce, the environment, and national security. Exposing commercial maritime operators to the risk of punitive damages would subject them to significantly increased costs—costs likely to reverberate across the many aspects of American society that depend on maritime commerce.

1. Punitive damages have long been criticized because they induce potential defendants "to spend more to prevent the activity that causes the ... harm ... than the cost of the harm itself." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 593 (1996) (Breyer, J., concurring). Such "overdeterrence" occurs because firms take socially wasteful precautions or decline to engage in socially valuable commercial activity altogether. Polinsky & Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 882-883 & n.29 (1998). The problem of overdeterrence is often exacerbated by "the stark unpredictability of punitive awards." *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 494-501 (2008); *see* Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133, 145 & n.60 (1982); Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2078 (1998); Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 Temp. L. Rev. 1013, 1022-1023 (2007).[11]

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[11] The risk of overdeterrence may be lessened where tortfeasors are likely to escape liability, *see Exxon Shipping Co.* v.

Overdeterrence through punitive damages is particularly likely in this context because, unlike in many other tort contexts, unseaworthiness exposes owners and operators of vessels to criminal liability—already a strong deterrent. 46 U.S.C. § 10908; *see* Sunstein et al., 107 Yale L.J. at 2084. And the need to avoid overdeterrence is great in the strict-liability regime of unseaworthiness, which does not serve a "punitive or deterrent purpose"; "[w]hen our law imposes strict liability, it often accompanies this with limitations, not existing in the case of liability based on fault, as to amount, as to persons benefited, or as to both." *Igneri* v. *Cie. de Transports Oceaniques*, 323 F.2d 257, 268 (2d Cir. 1963) (Friendly, J.).

Those costs and inefficiencies would be particularly salient in unseaworthiness cases. Because unseaworthiness is a strict-liability regime, in which fault need not be proved, it is comparatively easy for a plaintiff to survive dispositive pretrial motions and then prevail at trial. The threat of punitive damages will therefore have an *in terrorem* effect on unseaworthiness defendants, pressuring them to settle weaker cases or to settle for more money than they otherwise would.[12] That

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Baker, 554 U.S. at 494; Polinsky & Shavell, 111 Harv. L. Rev. at 888, but that is not likely to be the case generally in personal-injury actions based on unseaworthiness. The owner or operator will usually be known, the harm will likely have "occurred openly," and "the magnitude of the harm is such that the victims almost surely will bring suit." Polinsky & Shavell, 111 Harv. L. Rev. at 891; *see* Sunstein et al., 107 Yale L.J. at 2076.

[12] *See, e.g.*, Henderson, *The Impropriety of Punitive Damages in Mass Torts*, 52 Ga. L. Rev. 719, 747 (2018) ("[T]he risk of suffering a crushing punitive damages penalty gives rise to so-called 'blackmail settlements' in which defendants pay more than the relevant mass tort claims are reasonably worth."); Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37

dynamic would be "particularly strong," Seamon, *An Erie Obstacle to State Tort Reform*, 43 Idaho L. Rev. 37, 89-90 (2006), because unseaworthiness defendants would have to pay out of pocket; liability insurers ordinarily exclude punitive damages from policy coverage.[13]

Vand. L. Rev. 1117, 1156 (1984) (describing "the now universal practice of plaintiffs alleging and demanding punitive damages in an effort ... to compel defendants to settle meritless cases because of the fear that a jury will return an outrageous punitive damage award"); Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions*, 60 Baylor L. Rev. 880, 916 (2008) (when a case "includes a claim for punitive damages claim, the combined settlement pressure increases exponentially"); Berch & Berch, *An Essay Regarding* Gasperini v. Center for Humanities, Inc. *and the Demise of the Uniform Application of the Federal Rules of Civil Procedure*, 69 Miss. L.J. 715, 727 n.49 (1999) (describing "the concomitant increase in the settlement value of a case once a claim for punitive damages is added"); Maskin, *Litigating Claims for Punitive Damages: The View from the Front Line*, 31 Loy. L.A. L. Rev. 489 (1998) ("[T]here is no doubt that the possibility of an extraordinary punitive damages award influences the dynamics of personal-injury litigation by increasing plaintiffs' opportunities and defendants' exposure."); Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. Legal Stud. 663, 666-669 (1997) (explaining why studies looking only at the effects of punitive damages on trial outcomes alone are likely to "substantially understate the impact of punitive damages on settlements"); Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 Wis. L. Rev. 169, 172, 176-177 & n.25 (1998) (concluding based on hundreds of interviews with lawyers that the perceived risk of large and unpredictable punitive damages awards "plays a significant role in driving settlements").

[13] *See, e.g.*, Brown, *Marine Insurance for Punitive Damages* (2014), https://www.ajg.com/media/1615159/marine-insurance-for-punitive-damages.pdf (explaining that "[t]he marine market has traditionally excluded coverage [of] punitive damages specifically in marine liability policies," but noting that some insurers "reluctant[ly]" have begun to extend such coverage to large accounts in

2. By thus raising operating costs unjustifiably, recognition of punitive damages in unseaworthiness actions would create "a devastating potential for harm," *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting), in an industry that "is vital to both the national defense and the commercial welfare of our country," *Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908, 911 (D.C. Cir. 1982), and that provides an environmentally advantageous means of transportation.[14]

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response to American court decisions); Ray, *Punitive Damages Under Protection & Indemnity and Maritime Employer's Liability Policies* (Oct. 31, 2011), http://insurancethoughtleadership.com/punitive-damages-under-protection-indemnity-and-maritime-employers-liabilit ("[P]unitive damages typically are not covered under Protection and Indemnity (P&I) or Maritime Employers Liability (MEL) policies.... We are not aware of any U.S. Protection and Indemnity or Maritime Employer's Liability insurance products that do not have an exclusion for punitive damages."); *see also* Widiss, *Liability Insurance Coverage for Punitive Damages? Discerning Answers to the Conundrum Created by Disputes Involving Conflicting Public Policies, Pragmatic Considerations and Political Actions*, 39 Vill. L. Rev. 455, 460-468 (1994) (explaining the many reasons why liability insurance policies are frequently construed to exclude punitive damages).

[14] *See, e.g.*, Navy League of the United States, *America's Maritime Industry: The Foundation of American Seapower* 4, 7-8, 11, 14-15, https://www.navyleague.org/file/programs/Maritime-Policy-Statement-Report.pdf; Texas Transportation Institute, Center for Ports and Waterways, *A Modal Comparison of Domestic Freight Transportation Effects on the General Public* 34, 38 (2007), https://www.maritime.dot.gov/sites/marad.dot.gov/files/docs/resources/3746/phaseiireportfinal121907.pdf (comparing the energy efficiencies and emissions generated by highway, railroad, and maritime transport, and finding maritime transport to be consistently more energy-efficient and to generate fewer emissions).

The nation's commercial maritime fleet comprises more than 40,000 vessels, which transport about 100 million passengers annually, as well as every conceivable type of raw material and consumer good.[15] In 2009 alone, U.S. marine vessels transported $1 trillion worth of imports and exports.[16] A robust domestic maritime industry also facilities American military readiness and strength.[17] United States commercial vessels transport our servicemembers and their supplies around the world, including 95% of the dry cargoes to U.S. and Coalition Forces in Iraq and Afghanistan since 2008.[18]

The maritime industry has achieved those levels of integration into U.S. commerce and national security under a legal regime in which owners and operators have largely been free from the specter of punitive damages in connection with injury or death caused by a ship's unseaworthiness. The maritime industry's ability to perform its vital and varied roles would be jeopardized by the recognition of punitive damages in unseaworthiness actions.

The increased operating costs that would occur under such a regime would likely "be eventually passed along to consumers," whether private or governmental. *McBride*, 768 F.3d at 401 (Clement, J., concurring); *see also, e.g., In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1490 (D.C. Cir. 1991) ("The award

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[15] American Maritime Partnership, *Frequently Asked Questions*, https://www.americanmaritimepartnership.com/faq/; *The Foundation of American Seapower*, *supra* n.14, 7-8, 14.

[16] *The Foundation of American Seapower*, *supra* n.14, at 12-13.

[17] *Id.* at 16-18.

[18] *Id.* at 16-17.

of punitive damages ... would increase the amount of litigation, the cost of insurance, and ultimately the price of air transportation."); Polinsky & Shavell, 111 Harv. L. Rev. at 952 ("To cover the added cost of punitive damages, firms will tend to raise their prices, which will cause the welfare of their customers to decline."). Faced with higher prices, consumers might choose to buy less, and manufacturers, distributors, and exporters may shift to other modes of transportation that are less cost effective and more damaging to the environment. Similarly, military spending could increase or readiness could decrease.

Moreover, recognition of punitive damages in unseaworthiness actions would prejudice U.S. maritime actors in international commerce, given that "punitive damages overall are higher and more frequent in the United States than they are anywhere else." *Baker*, 554 U.S. at 496-497; *see also* Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 Colum. J. Transnat'l L. 507, 508 (2007) ("American awards dwarf what is allowable in [other common law] countries."). In fact, many other countries—including three of the United States' top four trading partners (China, Mexico, Japan, and Germany)—do not recognize punitive damages in maritime actions at all. *See, e.g.*, Johnson, *Punitive Damages, Chinese Tort Law, and the American Experience*, 9 Frontiers L. China 321, 321-324 (2014); Duff, Comment, *Punitive Damages in Maritime Torts: Examining Shipowners' Punitive Damage Liability in the Wake of the* Exxon Valdez *Decision*, 39 Seton Hall L. Rev. 955, 973-974 (2009); Davies & Hayden, *Global Issues in Tort Law* 12 (2008); Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, N.Y. Times, Mar. 26, 2008 ("Most of

the rest of the world views the idea of punitive damages with alarm."); *see also* ASPA Cert. Br. 7-10.

In light of these serious adverse consequences, there is no good reason for the Court to drastically change the strict-liability cause of action of unseaworthiness, at this late date, from a mechanism by which seamen may obtain fair compensation for their injuries to a punitive measure. Doing so would wrest unseaworthiness from its historical origins, divorce it from the Jones Act negligence cause of action to which it has been closely paired for decades, and unsettle the legal regime that has allowed American maritime commerce to thrive.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2019

No. 18-266

IN THE
Supreme Court of the United States

THE DUTRA GROUP,
Petitioner,

v.

CHRISTOPHER BATTERTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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February 21, 2019

QUESTION PRESENTED

Whether punitive damages may be awarded in a personal-injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.

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INTRODUCTION

In *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), this Court held that punitive damages are available in general maritime actions by injured members of a vessel's crew for failure to provide maintenance and cure. *Townsend* also held that the Jones Act does not eliminate that remedy. As the court of appeals correctly recognized, *Townsend* compels the conclusion that respondent Christopher Batterton can seek punitive damages for petitioner's breach of the general maritime duty to provide a seaworthy vessel.

Petitioner offers no sound reason for depriving a vessel's crewmembers of the ability to seek punitive damages in appropriate cases of unseaworthiness or for shielding maritime bad actors from the deterrent effect of those damages. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), does not mandate that result. As the *Townsend* Court recognized, *Miles* addressed the scope of a wrongful-death action that this Court created under the general maritime law to match wrongful-death provisions in federal statutes, most notably the Jones Act. Because the Court had been guided by congressional action in creating a new cause of action for wrongful death, the Court tailored the scope of that action to mirror the existing wrongful-death actions established by Congress. *Townsend* held that "nothing in *Miles* or the Jones Act" limits the relief available when, as here, both the general maritime cause of action and the remedy existed before the Jones Act. 557 U.S. at 407.

Petitioner's theory fails for the additional reason that its key premise – the unavailability of punitive damages under the Jones Act – is incorrect. The Jones Act incorporates the Federal Employers'

Liability Act ("FELA"), which governs the civil liability of railroads for injuries to railway workers. FELA (and thus the Jones Act) permits punitive damages because it provides for the recovery of "damages" without any textual limitation. Punitive damages fall within the plain meaning of "damages" and were a well-established form of damages under pre-FELA common law. Because FELA and the Jones Act permit punitive damages, affirmance would be required even if, contrary to *Townsend*, those statutes controlled respondent's remedies under pre-existing general maritime law.

STATEMENT

A. Types Of Actions Available For Injured Crewmembers Under General Maritime Law And The Jones Act

Life at sea is extremely dangerous. "Seamen" – masters or members of a ship's crew, *see Chandris, Inc. v. Latsis*, 515 U.S. 347, 355-56, 368-72 (1995) – "are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour." *Harden v. Gordon*, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6,047) (Story, J.). For that reason, crewmembers are "emphatically the wards of the admiralty," entitled under federal maritime law to "a peculiar, protecting favor and guardianship." *Id.* at 485.

Under maritime law, crewmembers receive a "trilogy of heightened legal protections . . . because of their exposure to the 'perils of the sea.'" *Chandris*, 515 U.S. at 354. The first two of those heightened protections arise under the general maritime law formed through judicial precedent, and the third is statutory. Maritime law "falls within a federal court's jurisdiction to decide in the manner of a

common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489-90 (2008) (citing U.S. Const. art. III, § 2, cl. 1).

The first heightened protection is maintenance and cure. Under general maritime law, a crewmember who "falls sick, or is wounded, in the service of the ship" is entitled to recover "maintenance and cure" – that is, food and lodging (maintenance) and adequate medical treatment (cure) – to the point of "maximum cure." *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 413 (2009); *Farrell v. United States*, 336 U.S. 511, 513-19 (1949); *see Vella v. Ford Motor Co.*, 421 U.S. 1, 3-5 (1975). A crewmember who is denied maintenance and cure has a cause of action under general maritime law against the employer. *See Townsend*, 557 U.S. at 412-14.

Second, maritime law protects the rights of crewmembers to work aboard a seaworthy vessel. As early as 1789, federal courts recognized the "engagement[] of the captain to the mariners . . . that[,] at the commencement of a voyage, the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy." *Dixon v. The Cyrus*, 7 F. Cas. 755, 757 (D. Pa. 1789) (No. 3,930). By 1903, this Court recognized the "general consensus of opinion among the circuit and district courts" to "allow[] an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness." *The Osceola*, 189 U.S. 158, 175 (1903).

A shipowner is liable for harms caused by "furnishing an unseaworthy" vessel. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 100 (1944). That "absolute" duty is not a standard of "perfection" or a requirement

"to furnish an accident-free ship." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960). Rather, the duty is to provide "a vessel reasonably suitable for her intended service." *Id.*

The third component of the trilogy is the Jones Act. In *The Osceola*, this Court held that, whereas the unseaworthiness action permitted an injured crewmember to sue for injuries caused by the unseaworthy condition of the ship, no cause of action allowed recovery for negligent acts of the master or a crewmember. *See* 189 U.S. at 173-75. Congress plugged that gap when it passed § 33 of the Merchant Marine Act of 1920,[1] referred to as the Jones Act. *See Townsend*, 557 U.S. at 415 ("Congress enacted the Jones Act primarily to overrule *The Osceola*").

The Jones Act provides that "[a] seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer." 46 U.S.C. § 30104. The Act defines the scope of the "civil action" that may be brought by reference to the federal laws "regulating recovery for personal injury to, or death of, a railway employee." *Id.* Congress thus incorporated the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-59. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 23, 32-33 (1990); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 391-92 (1924).

FELA provides that employers "shall be liable in damages" for "injury or death resulting in whole or in part from the negligence of any of the [employers'] officers, agents, or employees," or "by reason of any

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[1] Act of June 5, 1920, ch. 250, § 33, 41 Stat. 988, 1007 (codified as amended at 46 U.S.C. § 30104).

defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. § 51. FELA's text does not limit recoverable "damages," and this Court has long permitted injured railroad workers to recover both pecuniary damages (such as for lost wages) and non-pecuniary damages (such as for pain and suffering).[2]

In some cases, conduct subject to a Jones Act suit also gives rise to a claim under general maritime law. *See Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 18 (1963); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 374-75 (1932). In those cases, the general maritime law claims remain available. *See McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 222 n.2, 224 (1958).

B. *Miles* And *Townsend* Addressed Remedies Available For The Injury Or Death Of A Crewmember

This Court previously considered the types of compensatory damages available in actions arising from the death of a crewmember (*Miles*) and the availability of punitive damages under general maritime law (*Townsend*).

1. *Miles* clarified the compensatory damages available in wrongful-death cases

At common law, there was no remedy for a tort resulting in death. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 380-86 (1970). General

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[2] *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 556 (1994) (allowing recovery of damages "for emotional injury caused by fear of physical injury"); *Gruenthal v. Long Island R.R. Co.*, 393 U.S. 156, 161-62 (1968) (upholding recovery for pain and suffering).

maritime law initially followed that approach and did "not afford a cause of action for wrongful death." *Miles*, 498 U.S. at 23. In *Moragne*, the Court cited "the wholesale abandonment of the rule" against recovery for wrongful death in federal and state statutes, including the Jones Act, in holding that "an action does lie under general maritime law for death caused by violation of maritime duties." 398 U.S. at 388, 409. "*Moragne* did not set forth the scope of the damages recoverable under the maritime wrongful death action." *Miles*, 498 U.S. at 30.

In *Miles*, the Court addressed the types of compensatory damages available in a general maritime action arising from a crewmember's death. The worker in *Miles* had been killed by a fellow crewmember. *Id.* at 21. The decedent's mother sued on her own behalf and as the representative of the estate, alleging Jones Act negligence and breach of the duty to maintain a seaworthy vessel. *Id.* In her individual capacity, she sought recovery for her son's wrongful death, including damages for loss of financial support and services from her son and for "loss of society." *Id.* at 21-22; *see Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 585 (1974) ("The term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection."). As representative of her son's estate, she brought a survival action seeking compensation for her son's pain and suffering prior to his death and for his "lost future income." *Miles*, 498 U.S. at 22.[3]

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[3] The Jones Act allows for both a wrongful-death action and a survival action. *See Miles*, 498 U.S. at 23-24, 33. In a wrongful-death action, a decedent's family and other dependents seek

This Court granted review to address "two questions concerning the scope of damages under general maritime law" – whether damages for "loss of society" are available "in a general maritime wrongful death action" and whether general maritime law permits "a survival action for decedent's lost future earnings." *Id.* at 22-23.

In considering the first question, the Court looked to the Jones Act because that statute had provided the basis for recognizing the general maritime action for wrongful death of a crewmember. *See id.* at 23-24, 30 (discussing *Moragne*). The Court observed that, in *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59 (1913), it had construed FELA's wrongful-death provision in light of the first recorded wrongful-death statute, Lord Campbell's Act, and state statutes that followed. *Miles*, 498 U.S. at 32.

FELA's wrongful-death provision, like the statutes on which it was modeled, does not permit recovery by family members for deceased workers' losses. *See Vreeland*, 227 U.S. at 68 (wrongful-death recovery "includes no damages which [the deceased] might have recovered for his injury if he had survived"). Instead, they create "a new or independent cause of action" enabling family members to recover for "deprivation of the pecuniary benefits which the benefi-

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recovery for *their* losses resulting from the death – that is, what *they* would have received but for the deceased's untimely demise. *See Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 68-70 (1913). In a survival action, a representative of the decedent's estate seeks recovery for the *decedent's* injuries suffered before death. A survival statute enables any claim the deceased had at the time of death to survive and be pursued on behalf of the estate. *See Miles*, 498 U.S. at 33 ("[A] seaman's right of action for injuries due to negligence survives to the seaman's personal representative.").

ciaries might have reasonably received if the deceased had not died from his injuries." *Id.* at 69, 70. The compensatory damages that can be recovered in such an action are limited to "compensation for pecuniary loss or damage." *Id.* at 71. They do not include non-pecuniary damages such as "damages by way of recompense for grief or wounded feelings." *Id.* at 70.

In *Miles*, the Court reasoned that, by incorporating FELA into the Jones Act, Congress must have intended to incorporate "the *Vreeland* gloss" as well. 498 U.S. at 32. The Court concluded that "[]consisten[cy]" with the Jones Act's restriction on non-pecuniary compensatory damages in wrongful-death actions required limiting wrongful-death recoveries in general maritime actions in the same way. *Id.* at 32-33. Accordingly, the Court held, "there is no recovery for loss of society" – a "non-pecuniary loss" – "in a general maritime action for the wrongful death of a Jones Act seaman." *Id.* at 31, 33.

On the second question presented, the *Miles* Court declined to address whether general maritime law provides a right of survival. *See id.* at 34. Instead, the Court held that, if such a right exists under general maritime law, it does not allow for recovery of income the deceased would have earned but for death. *See id.* The Court reasoned that, because the Jones Act's "survival provision limits recovery to losses suffered during the decedent's lifetime," it would not "create" a broader remedy for lost post-death earnings under general maritime law. *Id.* at 36. The Court did not question the propriety of the jury's award of $140,000 under the Jones Act's survival provision for the deceased crewmember's pain and suffering before death. *See id.* at 22, 33-36.

2. *Townsend* addressed punitive damages available under general maritime causes of action pre-dating the Jones Act

In *Townsend*, the Court held there is "no legal obstacle" to the recovery of punitive damages in an action under general maritime law for failure to pay maintenance and cure. 557 U.S. at 408. In reaching that conclusion, the Court first traced the history of the common law in both England and the United States and concluded that "[p]unitive damages have long been an available remedy at common law for wanton, willful, or outrageous conduct." *Id.* at 409. The Court next established that the general rule permitting punitive damages "extended to claims arising under federal maritime law." *Id.* at 411. The Court then reasoned that "[n]othing in maritime law undermines the applicability of this general rule in the maintenance and cure context." *Id.* at 412. The Court also held that the Jones Act provides no basis "for overturning the common-law rule" permitting punitive damages because it "did not eliminate pre-existing remedies available to seamen." *Id.* at 415.

The *Townsend* Court rejected the argument that *Miles* required restricting the damages available under general maritime law. It "was only because of congressional action that a general federal cause of action for wrongful death . . . even existed; until then, there was no general common-law doctrine providing for such an action." *Id.* at 420. Having relied on the Jones Act to recognize a general maritime law remedy for wrongful death, *Miles*'s reasoning was "sound" in refusing to infuse that *new* general maritime law claim with a remedial scope beyond that of the statutory provision it had been crafted to match. *Id.*

That reasoning did not apply in *Townsend*, the Court held. Because "both the general maritime

cause of action (maintenance and cure) and the remedy (punitive damages)" pre-dated the Jones Act, it was "possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act." *Id.* The Court also explained that, because the scope of recovery under the Jones Act was not "determinative of" common-law remedies, it did not need to address the "argument that the Jones Act . . . prohibits the recovery of punitive damages in actions under that statute." *Id.* at 424 n.12.

C. Procedural History

1. Respondent Christopher Batterton was a Jones Act seaman employed as a deckhand aboard the SCOW 3 in waters off the California coast. *See* App. 2a; First Am. Compl. ¶¶ 2, 5, *Batterton v. Dutra Grp.*, No. 14-CV-07667 PJW, ECF No. 11 (C.D. Cal. Oct. 14, 2014) ("Compl."). In August 2014, a hatch cover on the vessel blew open as a result of pressurized air that had been allowed to build up in the compartment covered by the hatch. App. 2a-3a; Compl. ¶ 5. The hatch cover slammed into respondent's left hand, crushing it and leaving him permanently disabled and in need of ongoing medical care. Compl. ¶¶ 5, 11. The pressure built up because, among other reasons, the SCOW 3 lacked a "safe exhaust mechanism" or "relief valve" that could have relieved the pressure, and because petitioner directed the crew to close additional air vents. *Id.* ¶¶ 10, 15.

Respondent brought suit in the Central District of California alleging Jones Act negligence, breach of the duty to provide maintenance and cure, and breach of the duty to provide a seaworthy vessel. As to the last count, respondent alleged that petitioner "willfully, wantonly and callously breached the . . .

warranty of seaworthiness" and requested "punitive damages." *Id.* ¶ 17.[4]

2. Petitioner moved to strike or dismiss respondent's request for punitive damages. Relying on *Miles*, petitioner argued that recovery under the Jones Act is limited to "pecuniary losses"; that punitive damages should be considered "non-pecuniary" damages and therefore unavailable under the Jones Act; and that the asserted unavailability of punitive damages under the Jones Act should preclude recovery of punitive damages in an unseaworthiness action. Def.'s Mot. To Strike Punitive Damages from the Compl. or in the Alternative To Dismiss for Failure To State a Claim upon Which Relief Can Be Granted at 3, *Batterton v. Dutra Grp.*, No. 14-CV-07667 PJW, ECF No. 13-1 (C.D. Cal. Nov. 3, 2014).

The district court denied the motion, relying on Ninth Circuit precedent holding that "punitive damages are available in unseaworthiness claims under general maritime law." App. 20a (citing *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987)). The court then certified the issue for immediate appeal under 28 U.S.C. § 1292(b), *see* App. 32a, and the Ninth Circuit accepted the appeal, *see* App. 2a.

3. The Ninth Circuit affirmed. App. 1a-15a. The court explained it was bound by its prior decision in *Evich*, which "squarely held that punitive damages are available under general maritime law for claims of unseaworthiness." App. 3a (alteration omitted). The court rejected petitioner's argument that *Miles* "overruled *Evich*." App. 13a. It recognized that

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[4] Respondent did not seek punitive damages on the Jones Act claim because Ninth Circuit precedent, binding on the district court, holds that those damages are not permitted under the Jones Act. *See* App. 3a.

"limitations" on "recoveries" by family members "for wrongful death," which the *Miles* Court addressed, "have no application to general maritime claims by living seamen for injuries to themselves," such as respondent's claim. App. 14a. The court also questioned petitioner's premise that rejecting recovery of non-pecuniary damages should necessarily preclude punitive damages. App. 10a-11a, 13a. "[I]t is not apparent," the court stated, "why barring damages for loss of society" – a form of compensatory damages – "should also bar punitive damages." App. 10a. "That a widow may not recover damages for loss of the companionship and society of her husband has nothing to do with whether a ship or its owners and operators deserve punishment for callously disregarding the safety of seamen." App. 11a.

The Ninth Circuit also held that, "under *Townsend*, we would reach the same conclusion *Evich* did, even if we were not bound by *Evich*." App. 15a. It cited *Townsend*'s recognition that, "[h]istorically, punitive damages have been available and awarded in general maritime actions" and that "nothing in *Miles* or the Jones Act eliminates that availability." App. 12a (alteration in original). Because "[u]nseaworthiness is a general maritime action long predating the Jones Act," the court saw "no persuasive reason to distinguish maintenance and cure actions" addressed in *Townsend* "from unseaworthiness actions with respect to the damages awardable." App. 12a, 14a. In light of *Townsend*, the Ninth Circuit perceived no inconsistency between permitting punitive damages for unseaworthiness claims and denying them for Jones Act claims. App. 3a.

SUMMARY OF ARGUMENT

I.A. This Court's decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), compels affirmance. *Townsend* established that the common-law tradition permitting punitive damages extended to claims brought under general maritime law and that the Jones Act does not eliminate pre-existing general maritime claims and remedies.

This case is on all fours with *Townsend*. Both the cause of action (unseaworthiness) and the remedy (punitive damages) were well-established when Congress enacted the Jones Act. There is no evidence that unseaworthiness cases were excluded from the general rule permitting punitive damages. Therefore, under *Townsend*, injured crewmembers are entitled to seek punitive damages in appropriate unseaworthiness actions, regardless of whether punitive damages can be recovered under the Jones Act.

B. None of petitioner's three asserted bases for distinguishing *Townsend* has merit. *First*, overlap between the unseaworthiness action and the Jones Act action does not render *Townsend* inapplicable. *Townsend* addressed and rejected the same argument with respect to maintenance and cure, which also overlaps with the Jones Act, explaining that the "quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action." 557 U.S. at 423-24.

Second, evolution in the standards for determining liability for unseaworthiness does not differentiate this case from *Townsend*. The unseaworthiness cause of action itself was well-established before the Jones Act's passage, and developments in the *liability* standard do not suggest any change in the available *remedies*, such as punitive damages.

Third, petitioner fails to show, as *Townsend* requires, that unseaworthiness was affirmatively excluded from the general rule permitting punitive damages. On the contrary, reported decisions demonstrate that punitive damages were available for wanton breaches of the duty to furnish a seaworthy vessel.

C. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), does not control here because it addressed the scope of a wrongful-death action that this Court created in response to federal statutes providing similar relief. *Miles* deferred to Congress in fashioning the scope of a general maritime law action that owed its existence to congressional legislation. As *Townsend* held, *Miles* does not require limiting remedies when, as here, the general maritime law cause of action and remedy were not created in light of, but instead pre-dated, the pertinent federal statutes.

II.A. Under *Townsend*, punitive damages are available in respondent's unseaworthiness cause of action, regardless of whether they could be recovered under the Jones Act. Accordingly, it is not necessary to determine whether punitive damages can be recovered under the Jones Act to decide this case.

In any event, the Jones Act and the Federal Employers' Liability Act ("FELA") (which the Jones Act incorporates) permit punitive damages. FELA's text provides broadly for "damages" with no limitation as to the type of damages. Under pre-FELA common law, to which this Court looks in interpreting that statute, punitive damages were available in personal-injury actions brought by railroad workers against their employers. Construed in light of its common-law background, FELA permits punitive damages, and the Jones Act therefore does as well.

B. Petitioner ignores the statutory text and common-law background. It bases its contrary interpretation on inapposite snippets from decisions of this Court that described the compensatory damages available under FELA and the Jones Act, but did not address the availability of punitive damages. Petitioner also relies heavily on lower-court decisions that erroneously conflate the unique limitations on the compensatory damages available in wrongful-death cases with the availability of punitive damages in personal-injury cases.

III.A. Punitive damages have a long-established and firmly rooted place in American law generally and in maritime law in particular. In appropriate cases, punitive damages serve important purposes of punishing egregious misconduct and deterring the defendant and others from committing further bad acts. Punitive damages are especially important in the maritime personal-injury context. Crewmembers of vessels in navigation do dangerous work under the total control of the ship's master. Maritime law protects those workers with principles that punish and deter outrageous conduct that otherwise might arise far from the scrutiny of shore.

B. Petitioner's policy arguments are inconsistent with *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), are economically incoherent, and do not justify deviating from *Townsend*. Notably, although punitive damages have been available for decades in major maritime circuits, petitioner produces no example of an inappropriately high punitive-damages award in an unseaworthiness case.

ARGUMENT

I. PUNITIVE DAMAGES MAY BE AWARDED FOR BREACH OF THE DUTY TO FURNISH A SEAWORTHY VESSEL

"Historically, punitive damages have been available and awarded in general maritime actions," and they remained available following passage of the Jones Act, as this Court held in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 407, 415-24 (2009). Nothing excepts unseaworthiness from that general rule. The Court's treatment in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), of an "entirely different question" concerning compensatory damages in wrongful-death actions is not to the contrary. *Townsend*, 557 U.S. at 419.

A. *Townsend* Supplies The Controlling Principles

This Court in *Townsend* established three "settled legal principles" that are decisive here. 557 U.S. at 414. *First*, "punitive damages have long been available at common law." *Id.* *Second*, "the common-law tradition of punitive damages extends to maritime claims." *Id.* *Third*, absent evidence that a particular general maritime claim was "excluded from this general admiralty rule," an injured crewmember "is entitled to pursue punitive damages." *Id.* at 414-15.

The first and second *Townsend* principles are not disputed. Nor could they be. As the Court recognized in *Townsend*, "prior to enactment of the Jones Act in 1920, maritime jurisprudence was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen." *Id.* at 412. *Townsend*'s careful historical treatment of the issue, *see id.* at 409-12, is buttressed by

ample support throughout the judicial and scholarly volumes.[5]

The third *Townsend* principle is satisfied as well: unseaworthiness has existed comfortably within the firmament of maritime law for more than 200 years, and there is no evidence that unseaworthiness was excluded from the rule permitting punitive damages.

1. The unseaworthiness cause of action was well-established when Congress passed the Jones Act

Like the maintenance-and-cure cause of action addressed in *Townsend*, the unseaworthiness cause

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[5] *See Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 108 (1893) ("courts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages"); *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818) ("if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages"); *McGuire v. The Golden Gate*, 16 F. Cas. 141, 143 (C.C.N.D. Cal. 1856) (No. 8,815) (noting that, in tort, "the aggrieved party would be entitled to recover not only actual damages but exemplary"); *Boston Mfg. Co. v. Fiske*, 3 F. Cas. 957, 957 (C.C.D. Mass. 1820) (No. 1,681) (Story, J.) ("In cases of marine torts, or illegal captures, it is far from being uncommon in the admiralty to allow costs and expences, and to mulct the offending parties, even in exemplary damages, where the nature of the case requires it."); 2 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 599b, at 1156 (1912) ("Exemplary damages are awarded in Admiralty, as in other jurisdictions."); 2 JABEZ G. SUTHERLAND, THE LAW OF DAMAGES § 392, at 1264, 1272 (4th ed. 1916) ("Sutherland on Damages") (noting the "'well established principle of the common law that in . . . all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff,'" and explaining that that principle held in "courts of admiralty") (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)).

of action was "well established before the passage of the Jones Act." *Townsend*, 557 U.S. at 420. As early as 1789, a federal court recognized that, "at the commencement of a voyage, the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy." *Dixon v. The Cyrus*, 7 F. Cas. 755, 757 (D. Pa. 1789) (No. 3,930). *The Cyrus* concerned a counterclaim by a ship captain against his crew, seeking a judgment that they forfeited their wages when, having "discovered that [the ship] was very badly provided with running rigging" such that they could not "clue the sails without going aloft to search for the proper ropes," the crew "refused to weigh anchor, or proceed with the vessel in her present condition." *Id.* at 756. The court rejected the counterclaim, noting that, when "there is a manifest and visible deficiency" with a ship, "the mariners may reasonably complain and remonstrate." *Id.* at 757.

By 1876, federal law recognized that a seaman's successful claim for unseaworthiness could yield damages. *See Halverson v. Nisen*, 11 F. Cas. 310 (D. Cal. 1876) (No. 5,970). In *Halverson*, the vessel was found to be seaworthy, *see id.* at 311, but the court did not question the proposition that "[i]f, by the owner's negligence, the rigging or apparel are defective, and the seaman sustains an injury in consequence, the owner would be liable." *Id.* at 310. There was no mention of an exclusion from the "general admiralty rule" that punitive damages would be among those available. *Townsend*, 557 U.S. at 414-15.

In 1885, another federal court recognized the availability of damages for breach of the warranty of seaworthiness, rejecting the proposition that, under "maritime law," liability "extends only to proper care

and nursing, and the expenses of cure" (maintenance and cure). *The Edith Godden*, 23 F. 43, 46 (S.D.N.Y. 1885). Rather, the court held, "[t]here is no question that in modern maritime law the owners are responsible for due care and diligence in the proper equipment of the vessel for the contingencies of the voyage." *Id.*; *see also The Osceola*, 189 U.S. 158, 173-75 (1903) (citing additional cases).

Seventeen years before the Jones Act's passage, this Court recognized it "as settled" that "the vessel and her owner are ... liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." *The Osceola*, 189 U.S. at 175. That principle has been "settled law" in this Court since *The Osceola*: "[t]hat an owner is liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment has been settled law in this country ever since The Osceola." *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 (1946); *see Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 99 (1944) (unseaworthiness liability "has been settled law since ... The Osceola" and "was generally applied, before its statement in The Osceola, by numerous decisions of the lower federal courts during the last century") (citation omitted); *The Arizona v. Anelich*, 298 U.S. 110, 121 (1936) ("In declaring in The Osceola ... that the owner and vessel were liable to indemnify seamen for injuries caused by unseaworthiness ..., this Court adopted the pronouncements of many earlier cases in admiralty in which the rule was applied or recognized.").

This Court applied the unseaworthiness doctrine in a 1922 decision governed by pre-Jones Act law, *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255

(1922). In affirming an injured crewmember's damages judgment, the *Carlisle* Court held that the failure to instruct the jury on the pre-Jones Act bar to recovery for crewmember negligence (*see The Osceola*, 189 U.S. at 175; *supra* p. 4) was harmless because the jury would have been permitted to find unseaworthiness liability on the same facts. *See* 259 U.S. at 258-60.

As with maintenance and cure, nothing in maritime law indicates that the general rule permitting punitive damages was inapplicable in unseaworthiness actions. *See Townsend*, 557 U.S. at 412 ("Nothing in maritime law undermines the applicability of this general rule in the maintenance and cure context."). Neither *The Osceola*, which petitioner credits (at 4) with recognizing unseaworthiness as a basis for damages, nor any other pre-Jones Act unseaworthiness case suggested that the unseaworthiness cause of action restricted plaintiffs to a limited or nontraditional set of remedies.

2. Under *Townsend*, the Jones Act does not preclude the pre-existing punitive-damages remedy

The fact that unseaworthiness was not excluded from the general common-law rule is dispositive under *Townsend*. Respondent is "entitled to pursue punitive damages unless Congress has enacted legislation departing from th[e] common-law understanding." *Townsend*, 557 U.S. at 415. As this Court squarely held, the Jones Act did not do that: "the Jones Act preserves common-law causes of action." *Id.* at 417; *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488-89 (2008) (rejecting argument that federal statute precluded punitive damages under general maritime law).

The *Townsend* Court explained that the Jones Act cannot be read to have "eliminate[d] pre-existing remedies" for two key reasons. 557 U.S. at 415-16. *First*, the Jones Act granted plaintiffs "the right to 'elect' to bring a Jones Act claim, thereby indicating a choice of actions for seamen – not an exclusive remedy." *Id.* at 416. The Court observed that "the then-accepted remedies for injured seamen arose from general maritime law," citing *The Osceola*, which recognized causes of action not only for maintenance and cure but also for unseaworthiness. *Id.* As the Court concluded, "it necessarily follows that Congress was envisioning the continued availability of those common-law causes of action" because, "[i]f the Jones Act had been the only remaining remedy available to injured seamen, there would have been no election to make." *Id.*; *see McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225 (1958) (plaintiff permitted to "sue for both unseaworthiness and Jones Act negligence" although he cannot obtain double recovery for same injury).

Second, the Court looked to the Jones Act's remedial purpose for confirmation that Congress did not displace the general maritime law punitive-damages remedy. Reading the Jones Act to *reduce* the scope of existing common-law remedies would contravene this Court's consistent recognition "that the Act 'was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it.'" *Townsend*, 557 U.S. at 417 (quoting *The Arizona*, 298 U.S. at 123).

B. Petitioner's Efforts To Distinguish *Townsend* Fail

None of petitioner's three asserted grounds for distinguishing this case from *Townsend* has merit.

1. *Townsend* rejects limiting pre-existing general maritime remedies based on overlap among the Jones Act and general maritime law claims

Petitioner incorrectly contends (at 22-24) that unseaworthiness should be treated differently from maintenance and cure addressed in *Townsend* because only unseaworthiness "is an alternative cause of action to Jones Act negligence" and seeks compensation for "the same injury caused by the same accident." *See also* Chamber of Commerce et al. Amici Br. 15 ("The Jones Act and unseaworthiness claims have overlapping remedies.").

The argument fails because the same can be said of maintenance and cure, as the *Townsend* Court recognized. The *dissent* in *Townsend* contended that "any personal injury maintenance and cure claim in which punitive damages might be awarded could be brought equally under either general maritime law or the Jones Act." 557 U.S. at 427 (Alito, J., dissenting). The dissent thus argued – as petitioner does here – that the Court should adopt "a rule that applies uniformly under general maritime law and the Jones Act." *Id.*

The *Townsend* Court accepted the premise but rejected the conclusion. The "fact that seamen commonly seek to recover under the Jones Act for the wrongful withholding of maintenance and cure," the Court held, "does not mean that the Jones Act provides the only remedy for maintenance and cure claims." *Id.* at 422-23 (majority). "The laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action." *Id.* at 424; *see also id.* at 423

n.10 ("The fact that, in some cases, a violation of the duty of maintenance and cure may also give rise to a Jones Act claim is significant only in that it requires admiralty courts to ensure against double recovery.") (citation omitted).

That analysis applies equally here. Remedies for "negligence, *unseaworthiness*, and maintenance and cure . . . , when based on one unitary set of circumstances, serve the same purpose of indemnifying a seaman for damages caused by injury, depend in large part upon the same evidence, and involve some identical elements of recovery." *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 18 (1963) (emphasis added). When a crewmember's Jones Act and unseaworthiness claims "overlap[]," it is the crewmember's "privilege, in so far as the causes of action covered the same ground, to sue indifferently on any one of them." *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 374-75 (1932). The fact that general maritime law claims sometimes "overlap[]" with Jones Act claims is no basis for limiting general maritime remedies to "the lowest common denominator approved by Congress." *Townsend*, 557 U.S. at 424.

2. The evolution of the unseaworthiness liability standard does not undermine the availability of the punitive-damages remedy

The evolution of unseaworthiness from a due-diligence obligation to a strict-liability tort does not differentiate this case from *Townsend*. *Cf.* Pet. Br. 24-26. There is no question that the unseaworthiness action was "recognized" (Pet. Br. 24) before the Jones Act's enactment. *See The Osceola*, 189 U.S. at 175; *supra* pp. 17-20. That is dispositive under *Townsend*. The fact that the *liability* rules for

unseaworthiness evolved after 1920 does not suggest any evolution in the *remedies* available for unseaworthiness, let alone suggest that unseaworthiness was excluded from the general rule permitting punitive damages, as would be required under *Townsend*. Indeed, it is anomalous to suppose that, in making unseaworthiness liability easier to establish, courts *sub silentio* eliminated or restricted punitive damages when the employer acted maliciously or wantonly.

Unseaworthiness's eventual inclusion of harm without fault is irrelevant for the additional reason that punitive damages lie only in cases in which fault is established. *See Townsend*, 557 U.S. at 409 ("wanton, willful, or outrageous conduct"). Punitive damages cannot be "founded on strict liability" (*Miles*, 498 U.S. at 36) alone. Respondent alleges the appropriate level of fault – that petitioner "willfully" and "wantonly" breached the duty to furnish a seaworthy vessel. Compl. ¶ 17. That allegation would raise a valid unseaworthiness claim even under *pre*-Jones Act law.

Moreover, unseaworthiness is no different from maintenance and cure in those respects. The obligation to provide maintenance and cure is a strict-liability duty. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-6, at 281 (2d ed. 1975) (maintenance and cure "is a liability without fault which is based on the employment relationship"). Exposure to punitive damages arises from the aggravated failure to provide maintenance and cure, just as the aggravated breach of the seaworthiness duty exposes the employer to punitive damages.

In addition, like unseaworthiness, maintenance and cure also evolved in the decades following the Jones Act. Although the doctrine limits plaintiffs to

recovering for injuries suffered "in the service of the ship," *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 543 (1960), this Court in the 1940s and 1950s expanded that term to cover accidents affecting seamen while ashore on leave. *See, e.g., Warren v. United States*, 340 U.S. 523, 529 (1951) (explaining "reasons for extending maintenance and cure to shore leave cases" in 1943 and extending it still further); Virginia A. McDaniel, *Recognizing Modern Maintenance and Cure as an Admiralty Right*, 14 Fordham Int'l L.J. 669, 675 (1991) ("[T]he U.S. Supreme Court has consistently expanded maintenance and cure rights."). Petitioner ignores that history in erroneously asserting (at 25) that maintenance and cure "did not undergo a post-Jones Act revolution at all."

3. Congress enacted the Jones Act against a judicial acceptance of punitive damages in unseaworthiness actions

The lack of "evidence" that unseaworthiness claims were "excluded from" the general rule permitting punitive damages means that respondent is presumptively "entitled to pursue" those damages. *Townsend*, 557 U.S. at 414-15. To prevail under *Townsend*, petitioner would have to identify "cases establishing that [punitive] damages were historically unavailable for breach of the duty" to provide a seaworthy vessel, *id.* at 418, and it cites none (at 30-33).

In fact, several reported decisions demonstrate the traditional availability of punitive damages in unseaworthiness actions. One such case concerned "a most amazing and dramatic situation": the ship's first mate, a 285-pound man, "all bone and muscle, and with a reputation for ferocity as wide as the seven seas," assaulted several of the vessel's crewmembers. *The Rolph*, 293 F. 269, 269-70 (N.D. Cal. 1923), *aff'd*,

299 F. 52 (9th Cir. 1924).[6] The court held that, under the circumstances, *The Rolph* "was not a seaworthy vessel." *Id.* at 272; *see Miles*, 498 U.S. at 22 (recounting court of appeals' holding that crewmember's "extraordinarily violent disposition demonstrated that he was unfit and therefore that the *Archon* was unseaworthy as a matter of law").

The court awarded one of the plaintiffs, who had been severely beaten, the then-substantial sum of $10,000, *see The Rolph*, 293 F. at 272, even though that plaintiff had "recovered in another proceeding for wages and maintenance" and made "no claim . . . for expenses and cure," 299 F. at 54. Two other plaintiffs received $500, *see* 293 F. at 272, even though they *"did not claim any personal injury," id.* at 269 (emphasis added). The court explained that the question before it was "*not alone* [the] question even of the award of proper compensation," but rather how to address "ill treatment of the seamen" and to ensure "that youth of America should be attracted to the sea" and sailors "not be subject to such treatment." *Id.* at 271, 272 (emphasis added). Without using the words "punitive" or "exemplary," the court left no doubt that it was "not" merely awarding "compensation" for injuries sustained. *Id.* at 271.

In *Townsend*, this Court pointed to two pre-Jones Act decisions in which vessel owners failed to provide

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[6] Although *The Rolph* was decided shortly after the passage of the Jones Act, the court applied pre-Jones Act general maritime law because the case arose during the period of time when plaintiffs believed they had to choose to bring *either* a Jones Act claim or an unseaworthiness claim. *See McAllister*, 357 U.S. at 222 n.2 ("Recent authorities have effectively disposed of suggestions in earlier cases that an injured seaman can be required to exercise an election between his remedies for negligence under the Jones Act and for unseaworthiness.").

proper medical care for injured crewmembers and the courts awarded damages "that appear to contain at least some punitive element." 557 U.S. at 414 (discussing *The City of Carlisle*, 39 F. 807 (D. Or. 1889), and *The Troop*, 118 F. 769 (D. Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904)). Those cases are properly considered unseaworthiness cases, as well as cases involving failure to provide maintenance and cure. Although the courts did not use the term, the vessels in both cases were unseaworthy for the same reason *The Rolph* was: the vessel owners failed "to select men worthy to command their vessels and fit to be trusted with the safety and welfare of their crews." *The City of Carlisle*, 39 F. at 817; *see The Rolph*, 299 F. at 54 (to be seaworthy, vessel must "be properly equipped, and for that purpose there is a duty upon the owner to provide a master and crew generally competent").

The court in *The Noddleburn*, 28 F. 855 (D. Or. 1886), *aff'd*, 30 F. 142 (C.C.D. Or. 1887), expressly considered awarding exemplary damages in an unseaworthiness action. While the plaintiff crewmember was working atop the mast of the ship, a "seizing . . . gave way," causing the plaintiff to fall "30 or 40 feet" to the deck and to sustain serious injuries. *Id.* at 855-56. The facts showed that, "[s]hortly before the accident," another crewmember had attempted to repair what was known to be the faulty seizing but was "recalled" and reprimanded by the master, thus leaving the "line not repaired," and demonstrating the master's "actual knowledge" of the danger. *Id.* at 856, 858. The court found the crewmember's injury "directly attributable to the unsound and unseaworthy condition of this rope, resulting from the willful negligence and wanton indifference of the master." *Id.* at 860.

After awarding more than $1,500 for lost wages and suffering, the court considered "add[ing] the sum of $500, in consideration of the neglect and indifference" with which the master treated the plaintiff. *Id.* at 860. The court decided against that additional sum only because there was some question whether the plaintiff was partially negligent himself. *See id.* ("[U]nder the circumstances, I prefer to err in fixing the amount of damages against the libelant rather than in his favor."). That punitive damages were denied on the facts "does not draw into question the basic understanding that punitive damages were considered an available maritime remedy." *Townsend*, 557 U.S. at 412 n.2.[7]

Pre-Jones Act cases premising liability on negligence provide additional guidance. As *The Osceola* held, there was no negligence action available to injured crewmembers under general maritime law, and thus such cases are best understood as sounding in unseaworthiness. *See* 189 U.S. at 174-75 (examining, for example, *The A. Heaton*, 43 F. 592 (C.C.D. Mass. 1890), which "assume[s] the right of the seamen to recover against the masters or owners for . . . wilful or negligent acts," but was in fact a case "of injuries arising from unseaworthiness, although the learned judge . . . does not draw a distinction"). *The Troop* fits that mold, with the court of appeals expressly invoking negligence as a basis for liability in affirming the judgment, which as noted included

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[7] Although *The Noddleburn* arguably applied English law in part (while also citing federal law), it is a venerable unseaworthiness precedent. This Court relied on it in pronouncing the existence of an unseaworthiness action under general maritime law. *See The Osceola*, 189 U.S. at 174-75; *see also Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 68 (1913) (relying on English law).

a "punitive element" (*Townsend*, 557 U.S. at 414).[8] Similarly, in *Latchtimacker v. Jacksonville Towing & Wrecking Co.*, 181 F. 276 (C.C.S.D. Fla.), *aff'd*, 184 F. 987 (5th Cir. 1910) (per curiam), an action by a crewmember who alleged the ship was "so negligently" operated "as to cause his injuries," the court acknowledged that, had "wantonness or reckless negligence" been established, "exemplary damages might have been awarded." *Id.* at 276, 278.

In *Townsend*, this Court acknowledged that "the handful of early cases involving maintenance and cure, by themselves, d[id] not definitively resolve the question of punitive damages availability in such cases." 557 U.S. at 414 n.4. That did not alter the Court's conclusion because "the general common-law rule made punitive damages available in maritime actions," *id.*, and there was "no evidence that claims for maintenance and cure were excluded from this general admiralty rule," *id.* at 414-15. That reasoning applies squarely here. As in *Townsend*, the "early cases support" – "rather than refute" – the availability of punitive damages in unseaworthiness actions. *Id.* at 415 n.4.

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[8] *See The Troop*, 128 F. at 863 (district court did not err in finding "negligence in the failure of the master to send the appellee back to the hospital at Fusan, gross negligence in the treatment of the appellee at sea, and further negligence in the failure to send the appellee immediately to a hospital on arriving at Port Angeles, from all of which negligent acts the appellee has been permanently crippled, and disabled from following his calling as a mariner").

C. *Miles* Addressed The Remedy For A Newly Created Cause Of Action And Does Not Apply To Remedies And Claims That Pre-Dated The Jones Act

Miles v. Apex Marine Corp. is not applicable here. There, this Court confirmed that the Jones Act "abrogat[ed]" the pre-existing general maritime law rule barring recovery for wrongful death. *Miles*, 498 U.S. at 24. Having created a new general maritime law wrongful-death action to match the Jones Act, the Court held that it would be "inconsistent" "to sanction more expansive remedies" than Congress provided for under the Jones Act wrongful-death provision. *Id.* at 32-33. As the Court explained in *Townsend*, "it was only because of congressional action that a general federal cause of action for wrongful death on the high seas and in territorial waters even existed." 557 U.S. at 420. "As a result," the Court explained, "to determine the remedies available under the common-law wrongful-death action, 'an admiralty court should look primarily to the[] legislative enactments for policy guidance.'" *Id.* (quoting *Miles*, 498 U.S. at 27).

Petitioner's repeated reliance (at, *e.g.*, 15-16, 20-21) on the *Miles* Court's discussion of the respective roles of Congress and the courts of admiralty "plucks" that discussion "from its context and thereby transforms its meaning." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1329 n.7 (2015). That discussion occurred in the context of determining the scope of recovery under a new general maritime law action that the Court had created to parallel a statutory action. In that context, the Court appropriately looked to the statutory action's scope in fashioning the general maritime law.

Townsend dictates a different approach in this context. Here, "[u]nlike the situation presented in *Miles*, both the general maritime cause of action" – unseaworthiness – "and the remedy (punitive damages) were well established before the passage of the Jones Act." 557 U.S. at 420. Respondent seeks recovery for his own injuries and does not invoke the wrongful-death action recognized in *Moragne* and defined in *Miles*. The damages available under the Jones Act are therefore not "determinative" here anymore than in *Townsend*. *Id.* at 424 n.12.

Moreover, even in the wrongful-death context, this Court has recognized that congressional action does not "preclude" the Court from recognizing "new" rights to recovery under general maritime law that are "already logically compelled by our precedents." *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 820 (2001); *see Townsend*, 557 U.S. at 421 (discussing *Garris*). The punitive-damages remedy that the court of appeals permitted here is not "new," but it is "compelled" by this Court's precedent in *Townsend*.[9]

In asserting (at 23-24) that this case is governed by *Miles* because the underlying basis for liability in that case was unseaworthiness, petitioner fails to recognize that *Miles* involved "a cause of action for wrongful death," which "maritime law d[id] not afford," even when the death resulted from unseaworthiness. 498 U.S. at 23. In contrast, this case

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[9] *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), which petitioner cites (at 20-21), applied the same approach as *Miles* and reached the same result, declining to authorize loss-of-society damages in a general maritime law wrongful-death action brought by injured passengers (rather than crewmembers). That decision does not apply here for the same reasons *Miles* does not apply.

involves the unseaworthiness cause of action for injured crewmembers that existed under the general maritime law long before the Jones Act's passage. The *Miles* Court confirmed that the Jones Act "evinces no general hostility to recovery under maritime law" and did "not disturb seamen's general maritime claims for injuries resulting from unseaworthiness." *Id.* at 29; *see also id.* at 36 (acknowledging the general principle that "'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy'") (quoting *The Sea Gull*, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578) (Chase, C.J.)). As in *Townsend*, "[l]imiting recovery for [unseaworthiness] to whatever is permitted by the Jones Act would give greater pre-emptive effect to the Act than is required by its text, *Miles*, or any of this Court's other decisions interpreting the statute." 557 U.S. at 424-25.

II. IN ANY EVENT, THE JONES ACT PERMITS PUNITIVE DAMAGES

Because the Jones Act is not "determinative of" an injured crewmember's "remedies" under pre-existing general maritime claims, the *Townsend* Court did not need to decide whether the Jones Act permits punitive damages. 557 U.S. at 424 n.12. That approach is appropriate here as well. *See supra* Part I.

Petitioner, however, cannot prevail without establishing that the Jones Act and FELA prohibit recovery of punitive damages. Indeed, that is petitioner's lead argument (at 15-19). If the Court reaches those questions, it should hold that the Jones Act and FELA permit punitive damages in appropriate cases.

A. The Jones Act And FELA Permit Punitive Damages

The Jones Act authorizes crewmembers to recover for injuries resulting from employer negligence and incorporates FELA, which governs comparable actions by railway workers. *See supra* p. 4. Thus, if punitive damages are available under FELA, they are available under the Jones Act.[10]

1. FELA's text authorizes recovery of "damages" without limitation

FELA provides broadly that "common carrier[s] by railroad" engaged in interstate commerce "shall be liable *in damages* to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative." 45 U.S.C. § 51 (emphasis added); *see* An Act Relating to the liability of common carriers by railroad for their employees in certain cases, ch. 149, § 1, 35 Stat. 65, 65 (1908) (same). Nothing in FELA's text limits the types of "damages" available when railway workers are injured or killed in the course of their employment.[11]

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[10] The converse is not necessarily true. *See* Injured Crewmembers Amici Br. 28-31.

[11] *See Black's Law Dictionary* 314 (2d ed. 1910) (defining "damages" as including "[e]xemplary damages . . . awarded to the plaintiff . . . to punish the defendant for his evil behavior or to make an example of him, . . . also called 'punitive' or 'punitory' damages"); *Black's Law Dictionary* 316 (1891) ("damages" includes "[v]indictive damages . . . also called 'exemplary' or 'punitive'").

In *Vreeland*, this Court interpreted FELA's wrongful-death provision as permitting recovery for pecuniary losses only, even though "[t]he word 'pecuniary' did not appear" in the statute, because "Lord Campbell's act . . . and all those which follow it ha[d] been continuously interpreted as providing only for

Punitive damages therefore are presumptively available under FELA because, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 70-71 (1992); *see Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."); *see also Smith v. Wade*, 461 U.S. 30, 34 (1983) (looking to common law to confirm availability of punitive damages under 42 U.S.C. § 1983 "[i]n the absence of more specific guidance" in the statute).

This Court reached a similar conclusion in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). There, the Court "accorded broad scope to the statutory term 'injury' . . . in light of FELA's remedial purposes" and held that "claims for damages for negligent infliction of emotional distress are cognizable under FELA." *Id.* at 549-50. That same approach dictates a broad, plain-language interpretation of "damages" as including punitive damages.

2. Pre-FELA common law permitted punitive damages

Permitting punitive damages comports with the common-law backdrop against which FELA was enacted. *See Gottshall*, 512 U.S. at 557 ("[o]ur FELA cases require that we look to the common law when considering the right to recover").

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compensation for pecuniary loss or damage." 227 U.S. at 71. In light of the common-law background permitting recovery of punitive damages, *see infra* pp. 34-36, *Vreeland*'s approach supports giving "damages" its ordinary meaning as encompassing punitive damages.

Before FELA, injured railway workers seeking to recover against their employers for on-the-job injuries could bring negligence actions under the common law.[12] In such tort actions – as was and is generally true at common law, *see Townsend*, 557 U.S. at 409 – punitive damages were available in appropriate cases. *See Prentice*, 147 U.S. at 107 (calling the doctrine of "exemplary, punitive, or vindictive damages" "well settled"); *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 492 (1876) (same); *Philadelphia, W. & B. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1859) ("[w]henever the injury complained of has been inflicted maliciously or wantonly, . . . the jury are not limited to the ascertainment of a simple compensation for the wrong").

Congress passed FELA to make it easier for injured workers' actions to succeed, and this Court has "liberally construed" the statute "to further Congress' remedial goal." *Gottshall*, 512 U.S. at 543.[13] "In order to further FELA's humanitarian purposes, Congress did away with several common-law tort defenses that had effectively barred recovery by

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[12] *See, e.g., Santa Fe Pac. R.R. Co. v. Holmes*, 202 U.S. 438, 438 (1906) (action "for damages for injuries received by [plaintiff] in a head-on collision of two trains, on one of which he was an engineer"); *Texas & Pac. Ry. Co. v. Swearingen*, 196 U.S. 51, 53 (1904) ("action . . . to recover damages for personal injuries sustained by reason of the alleged negligence of the defendant company").

[13] *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 145 (2003) ("Enacted in 1908, Congress designed the FELA to 'shift part of the human overhead of doing business from employees to their employers.'") (quoting *Gottshall*, 512 U.S. at 542) (alteration omitted); *see also Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) ("[FELA] was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations.").

injured workers," *id.* at 542, and permitted recovery for wrongful death. Other than the ways FELA *broadened* railway workers' causes of action, the statute did not alter the traditional common-law landscape. *See id.* at 544 ("Only to the extent of these explicit statutory alterations is FELA an avowed departure from the rules of the common law.").

Accordingly, the remedies traditionally available at common law – including punitive damages – are available under FELA. *See id.* at 551 (where issue "not explicitly addressed in the statute, the common-law background of this right of recovery must play a vital role in giving content to the scope of an employer's duty under FELA"). That default rule is not specific to FELA (though it applies with special force in that context). This Court repeatedly has held that, "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993); *accord Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."). Because FELA did not disturb the common-law rule permitting punitive damages, such damages remain available under FELA – and thus under the Jones Act.

B. Petitioner Fails To Show That Punitive Damages Are Precluded Under Either FELA Or The Jones Act

Petitioner addresses (at 17-19) neither the text of FELA (or the Jones Act) nor the common-law authority identified above. Instead, petitioner pins its

argument on citations to inapposite decisions of this Court and erroneous lower-court decisions.

1. No decision of this Court makes punitive damages unavailable under FELA

Petitioner relies (at 18) on *Seaboard Air Line Railway v. Koennecke*, 239 U.S. 352 (1915), but that case did not decide the scope or types of damages available under FELA. *Koennecke* affirmed a judgment against a railroad in a wrongful-death action. *Id.* at 353-54. In addressing the railroad's argument that it was unfairly surprised by the plaintiff's request to amend the complaint to seek relief under FELA, the Court observed that the original complaint was ambiguous as to the source of law invoked. "If it were read as manifestly demanding exemplary damages, that would point to the state law," *id.* at 354, because the pertinent state statute expressly allowed exemplary damages, *see id.* at 353. On the other hand, the Court noted, "the [complaint's] allegation of dependence was relevant only under the act of Congress," *id.* at 354, because FELA's wrongful-death provision authorizes recovery for relatives "dependent upon [the deceased] employee," 45 U.S.C. § 51. Notably, although the Court observed that "the allegation of dependence was relevant *only* under the act of Congress," 239 U.S. at 354 (emphasis added), it did not similarly suggest that the demand for exemplary damages was relevant *only* under the state statute. *See also* Injured Crewmembers Amici Br. 22-24.

Punitive damages were not addressed at all in the remaining cases petitioner cites (at 17-18 & n.4), all of which considered only compensatory damages and none of which involved allegations of fault beyond simple negligence. *See St. Louis, Iron Mountain & S.*

Ry. Co. v. Craft, 237 U.S. 648, 655-61 (1915) (reviewing award of compensatory damages for pain and suffering in survival action); *Gulf, Colo. & S. Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 174-76 (1913) (reviewing award of compensatory damages to non-dependent relative in wrongful-death action); *American R.R. Co. of Porto Rico v. Didricksen*, 227 U.S. 145, 149-50 (1913) (addressing types of compensatory damages available in wrongful-death action); *Vreeland*, 227 U.S. at 68-70 (same); *see also Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928) (availability of punitive damages not addressed) (Pet. Br. 20).

None of the decisions petitioner cites undermines the plain-meaning interpretation of "damages" in FELA, which, particularly when read in light of the common-law background, includes punitive damages.

2. The lower-court decisions on which petitioner relies are in error

The court of appeals cases on which petitioner relies (at 18-19) for the proposition that punitive damages are not permitted under FELA and the Jones Act all stem from a fundamental misinterpretation of this Court's decision in *Vreeland*. There, this Court construed FELA's wrongful-death provision in light of other wrongful-death statutes that had been interpreted "as providing only for compensation for pecuniary loss." 227 U.S. at 71. In the lower-court decisions on which petitioner relies, the courts disregarded *Vreeland*'s wrongful-death context and asserted broadly that recovery under FELA – and, by incorporation, the Jones Act – is in all types of cases "limited to 'pecuniary' losses." *E.g.*, *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560 (9th Cir. 1984). The courts then reasoned that "[p]unitive damages are non-pecuniary" and therefore "may not be award-

ed on a claim of negligence based on the Jones Act." *Id.* at 561 (personal-injury case).[14]

a. The reasoning *Kopczynski* exemplifies is entirely incorrect as applied to personal-injury cases. *Vreeland*, on which *Kopczynski* and the other lower courts relied, involved the unique limitations on compensatory damages that apply in wrongful-death actions. As wrongful-death statutes have been interpreted, the scope of the compensatory damages available to the deceased worker's relatives is limited to their pecuniary losses and does not encompass non-pecuniary damages, such as "damages by way of recompense for grief or wounded feelings." 227 U.S. at 70; *see Miles*, 498 U.S. at 32 ("no recovery for loss of society in a Jones Act wrongful death action"); *supra* pp. 7-8.

Unlike in wrongful-death cases, FELA and the Jones Act permit *injured* workers (such as respondent) to recover both pecuniary *and non-pecuniary* damages. In *Gruenenthal v. Long Island Railroad Co.*, 393 U.S. 156 (1968), for example, this Court upheld a jury award in a personal-injury case under FELA that included damages for pain and suffering, *see id.* at 161-62, a classically non-pecuniary loss, *see Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 123 (1998) (addressing "the recovery of nonpecuniary losses, such as pre-death pain and suffering"). As a leading treatise published before the passage of

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[14] *Kopczynski* relied on *Kozar v. Chesapeake & Ohio Railway Co.*, 449 F.2d 1238 (6th Cir. 1971), which reasoned similarly. *Wildman v. Burlington Northern Railroad Co.*, 825 F.2d 1392 (9th Cir. 1987), and *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir. 1993), relied upon the analysis – and thus the errors – in *Kopczynski* and *Kozar*. *See also* Injured Crewmembers Amici Br. 25-28 (explaining additional errors).

the Jones Act confirms, "[i]n an action for personal injury" under FELA, "the plaintiff is entitled to recover . . . a reasonable sum for his pain and suffering." 5 Sutherland on Damages § 1331, at 5088; *see also Gottshall*, 512 U.S. at 556 (allowing recovery of damages "for emotional injury caused by fear of physical injury"). Indeed, *Vreeland* itself acknowledged that, had the plaintiff survived his injuries, he could have recovered for "suffering," among other things. 227 U.S. at 65. Ample authority confirms that non-pecuniary damages are equally available in personal-injury actions under the Jones Act.[15]

Thus, the key premise of *Kopczynski* and the other cases on which petitioner relies – that recovery under FELA and the Jones Act is limited to pecuniary damages – has no application in cases brought by injured workers, such as respondent. Respondent here seeks recovery for personal injuries under the Jones

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[15] *See, e.g.*, *Calo v. Ocean Ships, Inc.*, 57 F.3d 159, 162 (2d Cir. 1995) (affirming pain-and-suffering award in injured crewmember's Jones Act action); *Figueroa v. Campbell Indus.*, 45 F.3d 311, 316 (9th Cir. 1995) (injured crewmember "entitled to recover for his pain and suffering under the Jones Act"); *Koehler v. United States*, 200 F.2d 588, 591 (7th Cir. 1953) (plaintiff entitled to $2,500 in Jones Act damages for pain and suffering).

The same rule applies in survival actions, which permit the personal representative of a deceased worker's estate to pursue any claim that the decedent had at the time of death. *See, e.g.*, *Craft*, 237 U.S. at 657-61 (FELA's survival provision allows recovery for deceased worker's "pain and suffering" before death); *McBride v. Estis Well Serv., L.L.C.*, 853 F.3d 777, 781 (5th Cir. 2017) ("[u]nder the Jones Act," a representative bringing a survival action on behalf of a deceased crewmember's estate "can recover damages for pre-death pain and suffering"), *cert. denied*, 138 S. Ct. 644 (2018); *see also Miles*, 498 U.S. at 22, 37 (affirming judgment that included award of damages for pain and suffering in survival action).

Act and is accordingly entitled to seek both pecuniary and non-pecuniary damages. Therefore, even if petitioner's cases were right that "[p]unitive damages are non-pecuniary," *Kopczynski*, 742 F.2d at 561, punitive damages are permitted here.

Petitioner offers no defense of that fundamental defect in its theory. It appears to acknowledge in passing (at 27) that "the FELA/Jones Act bar on compensatory damages for non-pecuniary harms may apply only in wrongful-death actions, and not personal-injury cases." Petitioner asserts that it does not matter because "*the courts* have consistently recognized that punitive damages are not available under FELA and the Jones Act at all . . . even in personal-injury actions." Pet. Br. 28 (citing, *e.g.*, *Kopczynski*) (emphasis added). But the court decisions on which petitioner relies are indefensible as applied to this case. They apply a pecuniary-loss limitation on wrongful-death recovery that petitioner itself concedes is inapplicable to personal-injury cases such as this one.

b. In any event, even in the wrongful-death context, a bar on non-pecuniary compensatory damages does not preclude punitive damages. It is perfectly consistent to require that *compensatory* damages be pecuniary in nature while also honoring the common-law availability of punitive damages. Those distinct remedies serve distinct purposes, and the reasons for denying compensation for non-pecuniary losses, which are peculiar to the history of wrongful-death recovery, provide no basis for shielding violators of maritime law from punitive damages. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 80 (1997); App. 11a.

The state statutes on which *Vreeland* and *Miles* relied in construing FELA's and the Jones Act's wrongful-death provisions to preclude recovery for non-pecuniary losses support that conclusion. *Vreeland* explained that Lord Campbell's Act "and *all* those which follow it have been *continuously* interpreted" as permitting recovery of pecuniary losses only. 227 U.S. at 71 (emphases added). State statutes did *not* follow such a consistent approach with respect to punitive damages, however. A number of States in fact permitted punitive damages in wrongful-death actions, including some States that followed the pecuniary-loss limitation with respect to compensatory damages.[16] Thus, the statutory background on which *Vreeland* relied does not support imposing an a-textual gloss excluding punitive damages from the "damages" recoverable under FELA.

Petitioner is correct (at 28) that "allowing seamen to recover punitive damages for personal injuries but not wrongful death[] has little to recommend it." The law does not require that discordant result: FELA's pecuniary-loss limitation in wrongful-death actions says nothing about punitive damages, which were historically, and are now, available to FELA and Jones Act plaintiffs alike.

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[16] *See* 5 Sutherland on Damages § 1263, at 4865-69 (collecting cases); Injured Crewmembers Amici Br. 21-22 & n.8 (same); *see also, e.g., Calcaterra v. Iovaldi*, 100 S.W. 675, 676, 677 (Mo. Ct. App. 1906) (explaining in wrongful-death case that, with respect to compensatory damages, "none but pecuniary damages are allowed," while exemplary damages are also available "if there are circumstances of aggravation").

III. DISALLOWING PUNITIVE DAMAGES WOULD CONTRAVENE CENTURIES OF FEDERAL POLICY

Punitive damages promote important maritime policies, particularly in cases involving the injury or death of a crewmember resulting from willful or wanton misconduct. Petitioner makes no effort to square its facial challenge to punitive damages under general maritime law with *Townsend*, which reaffirmed that injured crewmembers are "entitled to pursue punitive damages" in "appropriate factual circumstances." 557 U.S. at 415. Petitioner's invitation to jettison that fundamental principle rests on outdated theories this Court has rejected and conflicts with sound economic principles.

A. Punitive Damages Promote Important Maritime Policies

The notion of "damages beyond the compensatory" has existed for millennia. *Baker*, 554 U.S. at 491 (citing, among other things, the Code of Hammurabi). American courts have allowed punitive-damages awards "since at least 1784." *Townsend*, 557 U.S. at 410. The availability of punitive damages is "a firmly established feature of American law." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 26 (1991) (Scalia, J., concurring in the judgment).

Punitive damages serve to punish egregious misconduct and deter the defendant and others from repeating it. *See Townsend*, 557 U.S. at 409 (punitive damages serve "as a punishment to the guilty" and "to deter from any such proceeding for the future"); *Baker*, 554 U.S. at 492 (punitive damages "are aimed . . . principally at retribution and deterring harmful conduct"); *see also Kemezy v. Peters*, 79 F.3d 33, 35 (7th Cir. 1996) (Posner, J.) (when a criminal

prohibition exists, punitive damages also "relieve the pressures on the criminal justice system"). Before the Jones Act, "[t]he general rule that punitive damages were available" as "punishment" for "lawless misconduct" was well-established in general maritime law. *Townsend*, 557 U.S. at 411.

Punitive damages are particularly appropriate in cases involving the injury or death of a crewmember. *See id.* at 412-13. A fundamental tenet of admiralty is that "seamen" are "emphatically" its "wards," *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6,047) (Story, J.), entitled to "special solicitude," *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970). Crewmembers subject to willful or wanton misconduct may "recover not only actual damages but exemplary – such as would vindicate his wrongs, and teach the tort feasor the necessity of reform." *The Golden Gate*, 16 F. Cas. at 143.

The law provides that extra protection not as a matter of charity. Rather, maritime law recognizes that crewmembers face extraordinary perils in the ordinary course of working in "commercial service" and the "maritime defence of the nation." *Harden*, 11 F. Cas. at 483. The deterrent effect of punitive damages promotes a safer environment for workers in commerce and national defense. Moreover, imposing punitive damages for aggravated misconduct resulting in injury, but not death, protects the crewmember who must return to the same employer's vessel by deterring the employer from repeating the misconduct and harming the worker again.

B. Petitioner's Policy Arguments Are Unsound

1. Petitioner chiefly complains (at 34) of "overdeterrence": that damages awards exceeding the cost of the harm encourage "wasteful precautions" that

cost more than the harm they avoid. But *Baker* rejected suggestions that the availability of punitive damages has "mass-produced runaway awards" or that recent data show a "marked increase in the percentage of cases" in which punitive damages are awarded. 554 U.S. at 497-98; *see id.* at 497 ("the most recent studies tend to undercut much of" the criticism of punitive damages). Indeed, *Baker* rejected as unpersuasive some of the specific scholarship on which petitioner relies. *See id.* at 498 n.15 (observing, *e.g.*, that Polinsky article cited at Pet. Br. 36 n.12 fails to "establish[] a clear correlation").

If petitioner's fear were justified, there would be evidence bearing it out following *Townsend*'s approval of punitive damages for withholding maintenance and cure. Yet, as petitioner's *amici* admit, the sky has not fallen: "grave consequences have not followed from this Court's decision in" *Townsend*. At-Sea Processors Ass'n et al. Amici Br. 7 n.6.[17]

Similarly, petitioner acknowledges (at 32-33 & n.9) that at least four maritime circuits expressly recognized the availability of punitive damages in unseaworthiness actions for many years, including two circuits (the Ninth and Eleventh) in which punitive damages have always been available, *see* App. 2a n.2. Yet petitioner cites no punitive-damages award from those circuits imposing the sorts of "adverse consequences" (Pet. Br. 34) it envisions.

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[17] The lack of a surge in punitive-damages awards suggests that they are functioning as intended. "Punitive damages are meant as a threat to discourage egregious misconduct. If the threat is well-designed, such damages should not have to be actually awarded very often. We want the threat to *work*." Robertson, 28 J. MAR. L. & COM. at 162-63.

2. Petitioner's overdeterrence concern is also economically incoherent.

a. Deterring the types of particularly blameworthy conduct that merits punitive damages *requires* that the cost of such conduct exceed the harm it causes. Such conduct is undertaken in the pursuit of "some specific gain" – *e.g.*, avoiding the cost of maintaining a seaworthy ship. William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REGULATION 33, 33 (Sept./Oct. 1986) ("Landes & Posner"). If that gain exceeds the cost of the harm it causes, it will not be deterred. *See Kemezy*, 79 F.3d at 34 (no deterrence from damages if "the benefits to [the defendant] are greater"); *see also, e.g., Anderson v. General Motors Corp.*, No. BC116926, 1999 WL 34868593 (Cal. Super. Ct. Aug. 26, 1999) (finding that General Motors "conscious[ly] disregard[ed]" "safety, in order to maximize profits"). Compensatory damages will be merely the cost of doing business.

Moreover, the cost of paying only compensatory damages usually will be low – and thus will fail to deter. Many crewmembers are modestly paid; a 2006 article, for example, reported that cruise line crewmembers earn between "less than $2 an hour" and "up to $3000" per month. Susan Lee, *Cruise Industry Liens Against the U.S. Penalty Wage Act*, 31 TUL. MAR. L.J. 141, 144-45 (2006).[18] Insofar as compensatory damages are guided by the injured plaintiff's lost earning potential, the cost of risking harm to

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[18] The largest (outlier) compensatory-damages awards the Chamber of Commerce could locate were for $1.1 and $1.8 million. *See* Chamber of Commerce et al. Amici Br. 7; *cf. Baker*, 554 U.S. at 476, 515 (compensatory damages of $507.5 million in environmental disaster).

members of the crew could pale next to the cost of taking proper precautions.

b. The overdeterrence concern is especially misguided with respect to intentional harms, which the tortfeasor – knowing what it is doing – "may try to conceal." Landes & Posner at 33. In that case, compensation-only awards "provide inadequate deterrence" because, counting the times the defendant gets away with it, the gains greatly exceed the costs. *Id.*; *see Kemezy*, 79 F.3d at 35 (if "a person who goes around assaulting other people is caught only half the time," then "in comparing the costs, in the form of anticipated damages, of the assaults with the benefits to him, he will discount the costs ... by 50 percent, and so in deciding whether to commit the next assault he will not be confronted by the full social cost of his activity"). The intentional acts of an unscrupulous vessel owner or unfit crew at sea can be quite difficult to prove months later, back on shore.

Relatedly, "heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect (increasing chances of getting away with it)," "[r]egardless of culpability." *Baker*, 554 U.S. at 494. Unseaworthiness actions often concern latent injuries that do not "occur[] openly" (Pet. Br. 35 n.11) – and that are thus difficult to detect and prove and easier to get away with. *See, e.g., Vaughn v. Farrell Lines, Inc.*, 937 F.2d 953, 955 (4th Cir. 1991) (describing unseaworthiness claim brought by wife of deceased crewmember who, over "his career ... on various vessels," "was exposed to ... asbestos, which

caused his death, in the boilers and engine rooms of the vessels in which he served").[19]

c. Petitioner lists (at 37-40) a host of speculative fears of rising operating costs and consumer prices. Those arguments, too, reflect unsound economics.

First, a rational firm need only avoid "wanton, willful, or outrageous conduct," *Townsend*, 557 U.S. at 409, to obviate the risk of punitive-damages liability. And the social *benefit* of that adjustment – of "tilting cost-benefit analyses towards safer practices"[20] – will redound to the public in the form of safer ships, safer waterways, and enhanced national security. Conversely, eliminating punitive damages would reward corner-cutting, which punitive damages deter by preventing a firm (or ship captain) that takes morally culpable risks "from gaining an unfair advantage over its more socially responsible competitors."[21]

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[19] Because unseaworthiness cases can involve intentional conduct, conduct motivated by financial gain, difficult-to-detect injuries, and low compensatory-damages awards, among other factors, a cap on punitive damages would be inappropriate. *See Baker*, 554 U.S. at 513 (distinguishing cases with conduct that is "intentional or malicious," is "driven primarily by desire for gain," or causes only "modest economic harm or odds of detection"). In any event, this case on the pleadings does not present the question whether punitive damages under unseaworthiness should be capped. *See Townsend*, 557 U.S. at 424 n.11 (declining to address the issue).

[20] Andrew B. Nick, *Market Share Liability & Punitive Damages: The Case for Evolution in Tort Law*, 42 COLUM. J.L. SOC. PROBS. 225, 234 (2008).

[21] Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 16 (1992); *cf.* Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 F.S.U.

Second, the fear of rising consumer costs ignores the reality that, in a competitive market, firms with higher costs cannot simply pass those costs on without sacrificing business.[22] Firms that wantonly disregard the safety of the workers they employ may well risk punitive-damages awards. But firms that behave responsibly will avoid that increased exposure, operate with relatively *lower* costs, and gain a competitive advantage. To compete effectively, the bad actor will not have the option to raise prices; rather, it will be forced to reduce costs by operating safe ships – the better outcome.

By contrast, a regime in which wanton misconduct *costs no more* than the occasional negligent slip-up removes any incentive to behave responsibly. That forces *good* actors to subsidize the more blameworthy acts of their less responsible competitors. And those perverse incentives ultimately undermine admiralty's flagship pursuit: the protection of crewmembers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

L. Rev. 653, 656 (1993) ("[s]afe products may not be able to compete if they sell for a higher price than dangerous ones").

[22] *Cf.* J. Hoult Verkerke, Note, *Compensating Victims of Preferential Employment Discrimination Remedies*, 98 YALE L.J. 1479, 1498 n.117 (1989) ("a firm that sells its products and buys its labor in perfectly competitive markets will be unable to pass on any compensation costs to customers or workers because any increase in the firm's product price would cause it to lose all of its business").

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No. 18-266

IN THE

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THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondent's argument that punitive damages are available for Jones Act seamen in unseaworthiness cases disregards several fundamental points:

First, unseaworthiness and Jones Act negligence are alternative means by which an injured seaman may recover compensation for his resulting loss. Consequently, due regard for the constitutional principles articulated in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990)—judicial deference to Congress's superior authority in maritime matters and the mandate to maintain legal uniformity—requires that the recovery available under the judicially created action for unseaworthiness not exceed the recovery Congress allowed for Jones Act negligence. By contrast, as the Court underscored in *Atlantic Sounding Co.* v. *Townsend*, 557 U.S.

404 (2008), maintenance and cure serves a different role—sustaining injured or ill seamen during their voyage—and so the Jones Act does not carry the same constitutional force with respect to maintenance and cure.

Second, modern unseaworthiness is a virtual substitute for Jones Act negligence in personal-injury actions no less than in wrongful-death actions. Although *Miles* was a wrongful-death case, its analysis cannot be limited to that context.

Third, it is too late to find that punitive damages are available under the Jones Act or FELA, which the Jones Act incorporates. Thousands of cases have been litigated under those century-old statutes, yet respondent and his amici make no credible showing that punitive damages might be allowed under either one.

Fourth, even if *Miles* were not controlling and the Court were free to decide *de novo* whether to allow punitive damages in unseaworthiness cases, the result should be the same. Unlike maintenance and cure, punitive damages were not historically available in unseaworthiness cases.

Finally, respondent's assurances that punitive damages will do no harm to the maritime industry overlook experience, economics, and common sense.

For all these reasons, the Court should hold that punitive damages may not be awarded to Jones Act seamen in unseaworthiness cases and reverse the judgment of the court of appeals.

ARGUMENT

I. The Scope Of Recovery For Unseaworthiness Follows That For Jones Act Negligence

A. Unseaworthiness And Jones Act Negligence Are Twin Rights To Compensation For The Same Loss—Unlike Maintenance And Cure

Respondent brushes aside the constitutional concerns of separation of powers and uniformity that animated *Miles* because he fails to acknowledge the essential differences between unseaworthiness and maintenance and cure—in particular, how each relates to Jones Act negligence. Unseaworthiness and Jones Act negligence serve the same role: compensating the wrongfully injured seaman for his resulting loss. Indeed, this Court has often called them "alternative" causes of action. Maintenance and cure serves a different purpose: sustaining the seaman who is ill or injured (however caused) with medical care, food, and wages during the voyage. It is not a compensatory right and therefore, as this Court has also observed, not an alternative of unseaworthiness or Jones Act negligence. Because of this difference, the constitutional principles applied in *Miles* have much greater force when the claim is based on unseaworthiness than when based on maintenance and cure.

1. Under the ancient right of maintenance and cure, "[w]hen a seaman becomes ill or injured while in the service of his ship, ... whether or not the shipowner was at fault or the ship unseaworthy," the shipowner must "pay[] a subsistence allowance, reimburs[e] medical expenses actually incurred, and tak[e] all reasonable steps to ensure that the seaman receives proper care and treatment." *Morales* v. *Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987); *accord, e.g.*, *Aggarao* v. *MOL*

Ship Mgmt. Co., 675 F.3d 355, 377 n.22 (4th Cir. 2012). But as this Court has recognized before and after the Jones Act, maintenance and cure "does not extend to compensation or allowance for the effects of the injury." *Pacific S.S. Co.* v. *Peterson*, 278 U.S. 130, 137 (1928); *see The Osceola*, 189 U.S. 158, 175 (1903). Rather, it "is a material ingredient in the compensation *for the labour and services* of the seamen" and thus is owed "at least so long as the voyage [i]s continued." *Peterson*, 278 U.S. at 137 (emphasis added) (quotation marks omitted).

The Court's decision in *The Osceola* is critical to understanding the force of the Jones Act. That decision, which barred maritime negligence actions, 189 U.S. at 175, left injured seamen with the right to subsistence through the voyage in the form of maintenance and cure, but without a practical means of recovering compensation for losses resulting from their injuries. As petitioner previously explained (at 6-7), unseaworthiness—all that remained after *The Osceola* foreclosed negligence—suffered from so many limitations that it hardly provided seamen any assurance of compensation.

Through the Jones Act, Congress gave injured seamen a more useful right to compensation for their loss: "'Congress enacted the Jones Act in 1920 to remove the bar to suit for negligence articulated in *The Osceola* ....'" *Townsend*, 557 U.S. at 415-416 (quoting *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 354 (1995)). But the Jones Act expressed no congressional intent regarding maintenance and cure other than to leave it alone, *see id.* at 416; *Peterson*, 278 U.S. at 138-139—naturally, since the compensatory gap created by *The Osceola* had nothing to do with maintenance and cure. Unlike actions to compensate for loss, Congress perceived no flaw in maintenance and cure that needed fixing.

Consistent with this history, shortly after enactment of the Jones Act the Court explained in *Peterson* that "[t]he right to recover compensatory damages under the new rule for injuries caused by negligence" (the Jones Act) "is ... an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness," but that the "right to maintenance, cure and wages [is] in no sense inconsistent with, or an alternative of, the right to recover compensatory damages." 278 U.S. at 138-139. The Court elaborated: "[W]hether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to but one indemnity by way of compensatory damages." *Id.*; *see McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 222 (1958). That is why unseaworthiness actions and Jones Act negligence actions have res judicata effect against each other but maintenance and cure actions do not. *Peterson*, 278 U.S. at 137-139; *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 319 (1927).

This fundamental difference between unseaworthiness and maintenance and cure explains why this Court's reasoning in *Miles* controls this case. In the decades following enactment of the Jones Act, the Court transformed unseaworthiness from an "obscure and relatively little used" alternative to Jones Act negligence into a powerful substitute. *See Miles*, 498 U.S. at 25. Thus, in *Miles*, the Court was sure not to "sanction more expansive remedies in a judicially created cause of action in which liability is without fault"—unseaworthiness—"than Congress has allowed" for negligence actions under the Jones Act. *Id.* at 32-33.

Otherwise, seamen could circumvent the limitations on compensation for wrongfully caused loss that Congress judged appropriate. That is not the case for maintenance and cure.

2. *Townsend* is consistent with that understanding of unseaworthiness and maintenance and cure. *Townsend* recognized that whether punitive damages are available cannot be divorced from the underlying cause of action, and that the constitutional import of Congress's remedial judgments in the Jones Act is much greater for unseaworthiness than for maintenance and cure. The Court quoted *Peterson* and other authorities explaining that unseaworthiness is an alternative right of compensation to Jones Act negligence but maintenance and cure is not. *See* 557 U.S. at 423-424. Accordingly, *Townsend* rightly distinguished *Miles* on the ground that, "unlike the facts presented by *Miles*, the Jones Act does not address maintenance and cure or *its* remedy." *Id.* at 420 (emphasis added); *see also id.* at 419 ("*Miles* does not address either maintenance and cure actions in general or the availability of punitive damages *for such actions*" (emphasis added)).

Respondent emphasizes repeatedly (at 9, 22) that *Miles* did not read the Jones Act to foreclose preexisting general maritime "causes of action," including unseaworthiness. But petitioner has not argued that the Jones Act eliminated unseaworthiness as a theory of liability. Rather, petitioner has pointed out that under *Miles* and *Townsend*, the remedies available for unseaworthiness should conform to those under the Jones Act, whereas that need not be true for maintenance and cure because that action is not an alternative right to recover compensation for wrongfully caused loss.

B. *Miles* Is Not Distinguishable On The Ground That The Court Created The Wrongful-Death Cause Of Action After The Jones Act

Respondent argues (at 5-8) that *Miles*'s holding is limited to wrongful-death actions, which the Court authorized only after the Jones Act. *Miles* did involve a deceased seaman, and in articulating the limits to recovery for wrongful death in unseaworthiness, the Court adhered to the Jones Act's limits for wrongful-death recovery. *See* 498 U.S. at 32-33, 34-35. But the Court's fundamental rationale—that in drawing the scope of recovery for a judicially created claim, the Court must respect the limits on recovery Congress placed on a statutory claim that serves the same remedial role—cannot be limited to wrongful-death cases.

Indeed, the Court in *Miles* saw no such distinction, for it stated that it would "not create, under our admiralty powers, a remedy that ... goes well beyond the limits of Congress' ordered system of recovery for seamen's *injury and death*." 498 U.S. at 36 (emphasis added); *see id.* at 29. And the Court applied its reasoning to resolve the scope of recovery not only for a wrongful-death action but also for a survivorship action, which is a form of personal-injury action. *See id.* at 36.[1]

Given that Congress precluded punitive damages for negligence claims under the Jones Act, whether for

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[1] Unlike a wrongful-death action, in which a decedent's heirs seek recovery for their own harms, in a survival action the representative seeks recovery for personal injuries the decedent suffered before death. 1 Stein, *Stein on Personal Injury Damages Treatise* § 3:53 (3d ed. 2018); 2 Lawrence, *Litigating Tort Cases* § 26:4 (2018); *see* 45 U.S.C. § 59 [FELA] ("Any right of action given by this chapter to a person *suffering injury* shall survive to his or her personal representative ....") (emphasis added)).

wrongful death or personal injury (*see* Pet. Br. 17-21; and *infra*, pp. 10-16), the Court's rationale in *Miles* applies fully here. "When Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, [the Court has] generally recognized, no cause for enlargement of the damages statutorily provided." *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 215 (1996); *see Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 624-625 (1978).

Respondent emphasizes (at 30-32) that the Court authorized maritime wrongful-death actions after Congress enacted the Jones Act, whereas unseaworthiness first emerged as a cause of action before 1920. In other words, according to respondent, the post-Jones Act general maritime action that *Miles* conformed to the Jones Act's limits was wrongful death, not unseaworthiness. That argument is flawed in several respects.

First, the modern doctrine of unseaworthiness is also a post-Jones Act creation. Despite respondent's suggestions to the contrary, this Court has recognized that the modern "doctrine of unseaworthiness as a predicate for a shipowner's liability for personal injuries or death" developed from a "humble origin as a dictum in an obscure case in 1922" and "experienced a most extraordinary expansion in a series of cases decided by this Court" starting in 1944. *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494, 496-497 (1971); *see Miles*, 498 U.S. at 25 (noting the "'revolution in the law that began with [*Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96 (1944)],' in which this Court transformed the warranty of seaworthiness into a strict liability obligation"); Pet. Br. 4, 6-7. For all intents and purposes, unseaworthiness no less than wrongful death is a post-Jones Act creation of the courts, and so its

remedies should equally conform to those in the Jones Act.[2]

Attacking petitioner's argument from the other direction, respondent claims (at 24-25) that maintenance and cure, too, has "evolved" since the Jones Act's enactment. But the changes in maintenance and cure to which respondent points were marginal. *See Townsend*, 557 U.S. at 412-413. More importantly, whatever post-Jones Act changes occurred have not converted maintenance and cure into yet another alternative means by which to recover compensation for wrongfully caused loss; it remains as it was at the time of *The Osceola*, a humane mechanism to afford subsistence and assistance to injured and ill seamen during the voyage.

In any event, the *sequencing* of the Jones Act and the Court's construction of the maritime cause of action is by no means material to the deference courts owe to Congress's preeminent constitutional power in maritime matters. As the Court explained in *Miles*, "[w]e no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; ... Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep

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[2] Respondent misreads (at 18-19) three old cases to argue otherwise. In *Dixon* v. *The Cyrus*, the court recognized that seamen refusing to board an unseaworthy ship have only a right to have the ship repaired or to receive lost wages. 7 F. Cas. 755 (D. Pa. 1789) (No. 3,930). In *Halverson* v. *Nisen*, the court, at most, mused about negligence and some understanding of unseaworthiness, but did not allow compensation for loss resulting from injury caused by either. 11 F. Cas. 310-311 (D. Cal. 1876) (No. 5,970). And in *The Edith Godden*, the court held that shipowners would be liable only for their negligence; it did not find liability based on unseaworthiness. 23 F. 43, 46 (S.D.N.Y. 1885).

the well-considered boundaries imposed by federal legislation." 498 U.S. at 27. Thus, whenever unseaworthiness emerged as a means to obtain compensation for loss, Congress's decision in the Jones Act to bar punitive damages in negligence actions arising from a seaman's injury or death—to say "this far and no more"—precludes the courts from going further now.

II. PUNITIVE DAMAGES ARE UNAVAILABLE IN JONES ACT NEGLIGENCE ACTIONS

Respondent invites the Court to overturn a century of settled precedent and become the first appellate court ever to hold that punitive damages are recoverable in a Jones Act negligence action. Because that disruptive outcome is foreclosed by statutory text and this Court's precedent, the Court should decline the invitation.

A. The law has long been settled that the Jones Act authorizes only compensatory damages. *See, e.g.*, *McBride* v. *Estis Well Serv., L.L.C.*, 768 F.3d 382, 388 (5th Cir. 2014) (en banc); *Miller* v. *American President Lines*, Ltd., 989 F.2d 1450, 1457 (6th Cir. 1993); *Kopczynski* v. *The Jacqueline*, 742 F.2d 555, 557 (9th Cir. 1984); *see also Peterson*, 278 U.S. at 136-138 (repeatedly characterizing the Jones Act as providing "the right to recover compensatory damages"). Throughout the statute's hundred-year history, "no cases have awarded punitive damages under the Jones Act," *McBride*, 768 F.3d at 388; respondent and his amici have not identified a single Jones Act case awarding punitive damages.[3] For the Court to reverse the

[3] Contrary to respondent's position (at 38-41), courts of appeals have held that punitive damages are unavailable without relying on the premise that the Jones Act limits recovery in per-

course of the law now would be an abrupt and surprising shift.

B. Such a shift would also be unjustified, because the rule limiting Jones Act recovery to compensatory damages is not just the settled view; it is correct.

1. The Jones Act adopts FELA's remedial scheme "unaltered," *Miles*, 498 U.S. at 32, and courts—including this Court—have consistently recognized that FELA does not allow punitive damages. This Court so recognized in *Seaboard Air Line Railway* v. *Koennecke*, 239 U.S. 352, 354 (1915), when it observed that, if a complaint brought for the death of a railway worker were read as claiming "exemplary damages," the complaint would necessarily arise under state law, not federal law. Respondent argues (at 37) that the Court was not suggesting that a claim for punitive damages was relevant only under the state statute, but that is the only reasonable reading of *Koennecke*. And *no* case since FELA's enactment in 1908 has suggested that punitive damages could be awarded.

Indeed, by the time Congress enacted the Jones Act, this Court had already emphasized the compensatory purpose of FELA recovery. Several of those decisions explicitly addressed actions for personal injury. *See Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65 (1913) (FELA gives nonfatally injured employee "such damages as would ... compensate him for his expense, loss of time, suffering, and diminished earning power"); *St. Louis, Iron Mountain & S. Ry. Co.* v.

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sonal-injury cases to pecuniary loss. For example, the Ninth Circuit in *Kopczynski* noted that "[p]rior to the enactment of the Jones Act in 1920, it had been established that only compensatory damages were available in FELA actions," 742 F.2d at 560—an accurate observation, as explained below.

Craft, 237 U.S. 648, 656, 658 (1915) (FELA "invests the injured employee with a right to such damages as will compensate him for his personal loss and suffering" and "is *confined* to his personal loss and suffering before he died" (emphasis added)). Although those opinions did not specifically address punitive damages, a rule "confining" recovery to compensatory loss leaves no room for punitive damages, which are by definition "not compensatory." *Barnes* v. *Gorman*, 536 U.S. 181, 189 (2002).

Relying on these cases, one Jones Act-era treatise stated that "in *all* actions under [FELA], an award of exemplary damages is not permitted." Roberts, *Federal Liabilities of Carriers* § 621, at 1093 (1918) (emphasis added); *see also id.* § 417, at 708 (noting that FELA embodies "the principle of compensation as a substitute for penalties in the way of damages"—perhaps a reference to the text limiting recovery to "damages ... for injury," as discussed below). Another declared without qualification that plaintiffs "cannot recover punitive damages" under FELA. Thornton, *A Treatise on The Federal Employers' Liability and Safety Appliance Acts* § 166, at 237 (3d ed. 1916). And respondent's own preferred treatise extensively catalogued the types of damages available in FELA personal-injury actions yet never mentioned punitive damages as a possibility. *See* 5 Sutherland, *A Treatise on the Law of Damages* § 1331, at 5088-5092 (4th ed. 1916).

When Congress enacted the Jones Act, it adopted this "gloss" on FELA. *See Miles*, 498 U.S. at 32. FELA's reenactment in 1939 without relevant change, *see* Pub. L. No. 76-382, 53 Stat. 1404 (1939), solidified that understanding. Where Congress reenacts a law that has been consistently interpreted by the courts (particularly this Court) without making any change, it

is assumed to have adopted that reading. *See Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 244 n.11 (2009); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

2. This consistent construction of FELA is firmly grounded in its text. Contrary to respondent's position (at 33), FELA's text does not give employees who "suffer[] injury" an unqualified right to damages. It entitles them only to "damages ... *for such injury*." 45 U.S.C. § 51 (emphasis added). But "punitive damages 'are not compensation for injury.'" *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). They therefore fall outside the scope of the compensatory relief FELA provides.

"Damages for injury" refers most naturally to damages with a compensatory purpose. The word "for" is often "used as a function word to indicate purpose" or "the object ... of a[n] ... activity" (as in: "a grant for studying medicine"). *Merriam-Webster's Collegiate Dictionary* 488 (11th ed. 2003). In this sense, "damages for injury" means damages that are aimed or directed at injury, as compensatory damages are. Punitive damages, on the other hand, "are aimed not at compensation but principally at retribution and deterring harmful conduct," with a focus on the behavior and characteristics of the tortfeasor rather than the condition of the particular injured party. *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 492-493 (2008). In other words, punitive damages are damages "for" punishing the defendant's conduct and deterring actors from engaging in similar conduct in the future; they are not damages "for" the victim's injury. *See Foust*, 442 U.S. at 48.

Other uses of "for" speak to the same distinction. The word can mean "in place of" (as in: "go to the store for me") or "equivalence in exchange" (as in: "$10 for a hat"). *Merriam-Webster's Collegiate Dictionary* 488. Compensatory damages stand in "place of" or "exchange for" injury; punitive damages do not. The word "for" can also mean "because of" (as in: "can't sleep for the heat"). *Id.* This Court has already confirmed that punitive damages are not damages "because of" injury. *See O'Gilvie* v. *United States*, 519 U.S. 79, 83 (1996) (punitive damages do not qualify as "damages received ... on account of personal injuries" under 26 U.S.C. § 104(a)(2) in part because "on account of" means "because of"). Petitioner's view makes sense of FELA's "for injury" limitation, whereas respondent's would read it out of the statute. Indeed, respondent's textual argument omits the phrase entirely. *See* Resp. Br. 33.

Respondent invokes the maxim that "federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). But the wrong is "made good" when the injured person is *compensated*; "[p]unitive damages are not compensatory, and are therefore not embraced within the rule described in *Bell*." *Barnes*, 536 U.S. at 189. Moreover, the *Bell* principle yields whenever Congress has provided "clear direction" on the subject, *Franklin* v. *Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 65 (1992), and Congress has done so here, *cf. Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton*, 377 U.S. 252, 261 & n.15 (1964) (no punitive damages under statute whose text provided only for recovery of "the damages ... sustained"). Finally, although the Court has "accorded broad scope" to FELA's use of the term "injury," *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532,

550 (1994), the question here is not whether respondent suffered "injury." No matter how broadly "injury" is construed, punitive damages cannot be damages "for such injury" within FELA's meaning.

3. Because punitive damages are categorically unavailable under FELA, they are categorically unavailable under the Jones Act. *See* 46 U.S.C. § 30104; *Miles*, 498 U.S. at 32. Amici's contrary argument (Injured Crewmembers Br. 28-31) rests on three inapposite cases. In two of those cases, the Court departed from the statutory text because of inherent differences between sea work and railroad work. *See The Arizona* v. *Anelich*, 298 U.S. 110, 122-123 (1936) (unlike railroad workers, seamen are unable to leave or inspect their workplaces, a predicate to assumption-of-risk defense); *Cortes* v. *Baltimore Insular Lines*, 287 U.S. 367, 377 (1932) (injured seamen may recover under the Jones Act for negligent failure to provide medical care because they are totally dependent on the ship). In *Cox* v. *Roth*, 348 U.S. 207, 209 (1955), the Court broadly construed a FELA provision allowing suits against corporate receivers to permit Jones Act suits against deceased employers; that broad construction was justified by the differences between the industries. By contrast, no such differences make punitive damages more appropriate in one context than the other. *Cf. Martin* v. *Harris*, 560 F.3d 210, 220 (4th Cir. 2009) (Jones Act incorporates FELA's prohibition on prejudgment interest because "the availability of prejudgment interest, *vel non*, is not a principle analytically limited to railroads or to the sea"). The Court should therefore decline to take the unusual step of disregarding the clear statutory text incorporating FELA wholesale into the Jones Act.

C. Pre-FELA common law does not counsel otherwise. Respondent stresses (at 34-36) that the Court

has sometimes looked to the common law "when considering the right to recover." *Gottshall*, 512 U.S. at 557. But the Court "turn[s] first to the statute." *Id.* at 542. Common law principles "are not necessarily dispositive of questions arising under FELA," *id.* at 544, particularly when "they are expressly rejected in the text of the statute," *id.*, as extra-compensatory damages are. Here, the directly relevant evidence—FELA's text, the Court's early FELA decisions, and contemporaneous treatises—shows that Congress prohibited punitive damages in FELA and carried that prohibition into the Jones Act.

III. Punitive Damages Are Also Unavailable Under *Townsend's* Framework

Miles provides the most straightforward approach to resolving this case, but the result would be the same under the *Townsend* framework. Respondent argues (at 25) that under *Townsend* punitive damages are available because "Congress enacted the Jones Act against a judicial acceptance of punitive damages in unseaworthiness actions." That argument fails for several reasons.

A. Punitive damages were not awarded in unseaworthiness actions before the Jones Act. None of the handful of scattered decisions to which respondent points shows otherwise.

Respondent relies most heavily on *The Rolph*, 293 F. 269 (N.D. Cal. 1923), but the best reading of the case shows it has nothing to do with punitive damages. Nowhere in that decision did the court state it was awarding such damages. As Judge Clement explained in *McBride*, "[t]he damages the court ordered were based on the testimony of medical witnesses and witnesses

concerning 'the expectation of life and earnings of these men.' If this case is the great proclamation of the historical availability of punitive damages for unseaworthiness, one wonders ... why the *Rolph* court felt it necessary to shroud its award in language that is patently compensatory ...." 768 F.3d at 396-397 (Clement, J., concurring) (quoting *The Rolph*, 293 F. at 272). In affirming, the Ninth Circuit clarified the compensatory nature of the damages, noting that they were "an indemnity for injuries." *The Rolph*, 299 F. 52, 54-55 (9th Cir. 1924). Respondent avoids any discussion of that "patently compensatory" language and reads out of context much of the remainder of the decision.[4]

Respondent's suggestion that the $500 awarded to seamen who "did not claim any personal injury," *The Rolph*, 293 F. at 269, 272, was punitive damages is also unpersuasive. Although punitive damages are not damages for an injury, it was well-settled at the time that a showing of some injury was a necessary predicate before punitive damages could be considered. A person who had suffered no injury could not have recovered damages at all. *See Actual Damages As a Necessary Predicate of Punitive or Exemplary Damages*, 33 A.L.R. 385 (1924). Although the court did not separately explain the basis for the $500 award, there is no reason to conclude it was for punitive damages.

The other decisions on which respondent relies are irrelevant. The awards in *The City of Carlisle*, 39 F. 807 (D. Or. 1889), and *The Troop*, 118 F. 769 (D. Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904), were based on a

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[4] Respondent states (at 26) that the court expressed concern about ensuring that potential seamen were not deterred from entering maritime service, but the court did not do so to justify the award of any particular amount of damages. *See* 293 F. at 271.

failure to provide maintenance and cure after the seaman's injury, as this Court already observed in *Townsend*, 557 U.S. at 414—not the conditions of the ship that led to the injury. *See The City of Carlisle*, 39 F. at 817 (damages for mistreatment of seaman "since his injury"); *The Troop*, 118 F. at 770-771 ("failure to observe the dictates of humanity for the relief of a sufferer"). Respondent claims (at 27) that those cases *should have been* decided (or "properly considered," in respondent's euphemism) based on unseaworthiness (or negligence) because the shipowners selected unacceptable crew members. But respondent's aspirational rewriting of those opinions does not constitute judicial recognition of punitive damages in unseaworthiness cases.

To the extent punitive damages were discussed in *The Noddleburn*, 28 F. 855 (D. Or. 1886), *aff'd*, 30 F. 142 (C.C.D. Or. 1887), they were based not on unseaworthiness, but on maintenance and cure. When the court considered awarding what might be construed as punitive damages, it was only "in consideration of the neglect and indifference with which the libelant was treated by the master *after his injury*." *Id.* at 860 (emphasis added).[5] A master's post-injury treatment of an injured seaman is the purview of the duty of maintenance and cure.

Finally, *Latchtimacker* v. *Jacksonville Towing & Wrecking Co.*, 181 F. 276 (C.C.S.D. Fla.), *aff'd*, 184 F. 987 (5th Cir. 1910), does not support respondent's position. The court did not invoke the duty of seaworthiness; the case appears to have been decided on a negligence theory. *See id.* at 276, 278. The court also did not address whether punitive damages might be allowed,

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[5] Respondent omits the phrase "after his injury" from his quotation of this sentence. *See* Resp. Br. 28.

because it found that the conduct at issue would not have warranted such damages. *Id.* at 278.[6]

B. In any event, even were respondent correct that scattered pre-1920 unseaworthiness cases awarded punitive damages, it would not follow that Congress adopted that position. In the Jones Act, Congress did *not* define the scope of damages for personal injury to a seaman by reference to preexisting general maritime law. Rather, Congress circumscribed it by reference to FELA, thus foreclosing punitive damages in such cases. This case is therefore quite different from *Townsend*; whereas the Jones Act does not address remedies for breach of the shipowner's duty to provide maintenance and cure, Congress did make clear that the remedy for a seaman's injuries attributable to the employer should be compensatory in nature. Respondent again seeks aid from *Townsend*, but there the Court said quite precisely that the Jones Act did not "eliminate pre-existing remedies available to seamen *for ... maintenance and cure*." 557 U.S. at 415-416 (emphasis added)—not for unseaworthiness.

Respondent invokes (at 21) *Townsend*'s observation that the purpose of the Jones Act was to "'enlarge'" the "'benefit and protection of seamen who are peculiarly the wards of admiralty'" (quoting *Townsend*, 557 U.S. at 417). The Jones Act indeed represented a major advance in the protection of seamen, giving them a powerful compensatory remedy for shipowners' negligence when previously negligence was not an available theory and unseaworthiness was often useless as a claim. But it

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[6] Respondent also cites *The A. Heaton*, 43 F. 592 (C.C.D. Mass. 1890), but that case does not discuss punitive damages. The award of $1,500 was expressly connected to "the extent of the petitioner's injuries." *Id.* at 597.

does not follow that Congress went even further and allowed seamen to recover extra-compensatory punitive damages. Nor does the notion that seamen are "wards of admiralty" require that every disputed legal issue be decided in favor of the seaman. Indeed, the Court made clear in *Miles* that Congress has final authority to define the remedies available to seamen, and courts must adhere to Congress's judgments—just as the Court did in *Miles*. 498 U.S. at 36 ("Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen ....").

C. The "revolution" in the unseaworthiness doctrine that began with *Mahnich* is also dispositive here. *See Miles*, 498 U.S. at 25. Even if punitive damages had been available before the Jones Act, respondent still could not establish that they would be available for unseaworthiness today, because the unseaworthiness doctrine was fundamentally "transformed" after the Jones Act's enactment. *See supra*, pp. 8-9; Pet. Br. 2-5. There is no reason to think Congress blessed punitive damages no matter how expansive the unseaworthiness action was to become in the future—particularly not if unseaworthiness became so expansive as to effectively supplant Jones Act negligence as the "'principal vehicle for recovery by seamen for injury or death.'" *Miles*, 498 U.S. at 25-26.

In sum, *Townsend* involved a claim, maintenance and cure, that (a) had been the basis for punitive damages awards before 1920, (b) was left untouched by Congress in the Jones Act, and (c) remains fundamentally the same as it was before 1920. None of those is true for unseaworthiness claims, whether for wrongful death or personal injury. Even under *Townsend*, therefore, respondent is not entitled to punitive damages.

IV. The Availability Of Punitive Damages Would Pose Unique Risks For The Maritime Industry

For the reasons explained above, this Court "need not pause to evaluate the opposing policy arguments"; Congress has already made the relevant policy choice. *Higginbotham*, 436 U.S. at 623. But if the Court determines it is free to tread beyond the boundaries Congress has set, the Court should do so carefully. Miscalibrating the optimal liability rules would undermine the "fundamental interest giving rise to maritime jurisdiction": "the protection of maritime *commerce*." *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 25 (2004).

Respondent does not deny the critical role the domestic maritime industry plays in the national economy. Nor does he deny that certain features of the maritime industry render it unusually vulnerable to disruption. As lead counsel for one of respondent's amici has argued: A "shipowner puts its assets at risk in ways that few other businesses can imagine. Both Congress and the courts have recognized that these risks, coupled with the need to encourage investment in such a vital industry, justify limiting a shipowner's liability in ways that do not exist for land-based businesses." Sturley, *Vicarious Liability for Punitive Damages*, 70 La. L. Rev. 501, 519 (2010). Compounding those risks are the inability to insure against punitive damages and foreign shipowners' freedom from these concerns. *See* Pet. Br. 35-36, 39-40. Respondent's amici's counsel is correct: "Because most other nations do not recognize punitive damages at all, it would make sense for the Court to limit the availability of punitive damages to the extent possible in the maritime industry." Sturley, 70 La. L. Rev. at 520.

Respondent also accepts the premise that allowing punitive damages will increase operating costs, but contends (at 48) that firms can avoid this hazard by simply avoiding what a jury might later find to have been "wanton, willful, or outrageous conduct." Of course, that is easier said than done. "[J]uries are accorded broad discretion both as to the imposition and amount of punitive damages," making "the impact of these windfall recoveries ... unpredictable and potentially substantial." *Foust*, 442 U.S. at 50; *see Exxon*, 554 U.S. at 499. The resulting increased operating costs affect the national economy. *McBride*, 768 F.3d at 401 (Clement, J., concurring). Respondent cites (at 49 & n.22) a student note to argue that, in theory, a given firm should be unable to pass on costs to consumers in a perfectly competitive market, but that condition does not obtain here. And the cloud of unpredictable punitive awards would loom over every market actor, not just culpable ones. Given the absence of "clear congressional guidance," the Court should "decline to inject such an element of uncertainty" into the maritime industry. *Foust*, 442 U.S. at 52.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 18-266

IN THE

Supreme Court of the United States

THE DUTRA GROUP,
Petitioner,

v.

CHRISTOPHER BATTERTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ALASKAN LEADER FISHERIES LLC, COASTAL MARINE FUND, FISHERMEN'S FINEST, INC., GLOBAL SEAS LLC, GOLDEN ALASKA SEAFOODS, LLC, NORTH STAR FISHING COMPANY LLC, NORTH STAR INSURANCE SERVICES, LLC, OCEAN PEACE, INC., O'HARA CORPORATION, TRIDENT SEAFOODS CORPORATION, UNITED CATCHER BOATS ASSOCIATION, AND UNITED STATES SEAFOODS, LLC IN SUPPORT OF PETITONER

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R. Seamon, *An Erie Obstacle to State Tort Reform*, 43 Idaho L. Rev. 37 (2006) 10

Thomas J. Schoenbaum, *Admiralty and Maritime Law* (6th ed. 2018) ..... *passim*

INTEREST OF THE *AMICI CURIAE*

Amici Curiae Alaskan Leader Fisheries LLC, Coastal Marine Fund, Fishermen's Finest, Inc., Global Seas LLC, Golden Alaska Seafoods, LLC, North Star Fishing Company LLC, North Star Insurance Services, LLC, Ocean Peace, Inc., O'Hara Corporation, Trident Seafoods Corporation, United Catcher Boats Association, and United States Seafoods, LLC, submit this brief to support The Dutra Group's position that a Jones Act seaman cannot recover punitive damages on a claim for unseaworthiness.[1]

They and their members and clients operate American fishing vessels in the Atlantic Ocean, Pacific Ocean, and Bering Sea, employing many hundreds of seamen in challenging environments. They value safe working conditions as well as uniform maritime law to compensate seamen when liability exists under Jones Act and/or unseaworthiness theories of liability.[2]

SUMMARY OF ARGUMENT

This brief addresses four points to demonstrate why the Court should rule that a seaman cannot recover punitive damages on an unseaworthiness claim under *Miles* although punitive damages can be recovered for willful or wanton denial of maintenance and cure under *Townsend*.

First, a seaman's general maritime law claim for unseaworthiness has a distinct history and nature

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[1] Pursuant to Rule 37.6, *Amici Curiae* disclose that no counsel for a party authored any part of this brief. Likewise, no person or entity other than the *amici* or their members contributed money to fund its preparation. Letters on file with the Clerk show that all parties consent to its submission.

[2] The subjoined Addendum sets out more complete descriptions of the *Amici Curiae* and their operations.

that puts this case within the ambit of *Miles*, not *Townsend*. In the 1940's, this Court radically changed unseaworthiness to a theory of liability without fault. Since then, it has been popularly paired with a seaman's statutory Jones Act claim based on fault – two distinct theories of liability on a single cause of action for the same compensatory damages.

A seaman's cause of action to recover damages either for unseaworthiness or Jones Act negligence is entirely distinct from a seaman's independent right to receive maintenance and cure, for which there is no statutory analog. Maintenance and cure was the only subject of *Townsend*. *Miles* addressed unseaworthiness, the claim presented in this case. Under *Miles*, a seaman cannot recover punitive damages for unseaworthiness under general maritime law because no such damages are allowed under the Jones Act.

Second, this Court has consistently held that Congress has the superior role when it comes to setting policy for maritime law and limiting remedies. Courts are not at liberty to grant more expansive remedies for personal injury or death under general maritime law than what Congress allowed in maritime personal injury and death statutes.

Third, the overarching goal of uniformity in maritime law also weighs heavily against allowing a seaman to recover punitive damages on an unseaworthiness theory of liability where the same seaman has no such remedy under the Jones Act.

Fourth, in the 2018 edition of his treatise, noted maritime law scholar Professor Thomas J. Schoenbaum objectively analyzed the very question presented by this case. He concluded that *Miles* applies and bars recovery of punitive damages on a seaman's personal injury claim for unseaworthiness.

ARGUMENT

I. *MILES*, NOT *TOWNSEND*, APPLIES TO THE UNSEAWORTHINESS QUESTION PRESENTED.

Miles v. Apex Marine Corp., 498 U.S. 19 (1990), held that damages recoverable on a claim for unseaworthiness cannot exceed pecuniary damages recoverable on a negligence claim for the same incident under the Jones Act. The rationale is that Congress has superior authority to decide maritime law and courts cannot exceed whatever limits are imposed by maritime personal injury and death statutes. The Jones Act is the statutory scheme that governs seamen's personal injury or death claims for compensatory damages. Unseaworthiness is an alternative judge-made theory of liability for the same injury. The Jones Act therefore constrains courts to limit damages on unseaworthiness claims by the same limits that apply to a Jones Act claim.

Atlantic Sounding Co., Inc. v. Townsend, 557 U.S. 404 (2009), addressed the very different issue of willful denial of maintenance and cure. That issue was beyond the reach and contemplation of *Miles*. Unlike unseaworthiness, maintenance and cure has no statutory counterpart. Seamen have long had an independent general maritime law right to maintenance and cure separate and apart from claims for compensatory damages under the Jones Act and for unseaworthiness. The Jones Act simply does not speak to the post-injury misconduct of willful or wanton failure to pay maintenance and cure examined in *Townsend*. *Townsend*, 557 U.S. at 420-21.

Miles, not *Townsend*, controls the unseaworthiness damages question presented in this case.

A. Since this Court radically changed it in the 1940's, a seaman's general maritime law claim for unseaworthiness has focused solely on the vessel's condition regardless of fault.

The modern seaman's general maritime law claim for unseaworthiness looks only at the condition of the vessel or its equipment in relation to the injurious incident. Fault concepts play no role. Either the vessel was reasonably fit for its intended purpose or it was not. But before Congress enacted the Jones Act in 1920, the unseaworthiness claim was quite different. The trigger for liability was fault of the owner – namely, whether the owner had failed to exercise due diligence to provide a seaworthy vessel.

Aside from sharing the same name, today's claim for unseaworthiness bears little resemblance to its predecessor. In its prior form, "[u]nseaworthiness was 'an obscure and relatively little used remedy,' largely because a shipowner's duty at that time was only to use due diligence to provide a seaworthy ship." *Miles*, 498 U.S. at 25, quoting G. Gilmore & C. Black, *The Law of Admiralty*, § 6-38 at 383 (2d ed. 1975). In other words, liability could only attach for the vessel owner's "failure to supply and keep in order the proper appliances appurtenant to the ship." *The Osceola*, 189 U.S. 158, 175 (1903). Due to the now defunct "fellow servant rule," no liability could attach for negligence of crewmembers aside from a vessel owner's independent obligation to pay maintenance and cure. *Id.*

In the 1940's, this Court radically changed the trigger for unseaworthiness liability from owner misconduct to a vessel's injurious condition regardless of how the condition developed – a species of liability regardless of owner fault or crew negligence. *Miles*, 498 U.S. at 25; *Mahnich v. Southern S. S. Co.*, 321 U.S. 96, 100 (1944); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95 (1946). "As a consequence of this radical change, unseaworthiness '[became] the principal vehicle for recovery by seamen for injury or death.'" *Miles*, 498 U.S. 25-26, quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 399 (1970).

B. In 1920, the Jones Act gave seamen a claim for compensatory damages for employer negligence based on FELA, including FELA's judicial gloss limiting recovery to pecuniary damages.

Several years after the Jones Act was enacted in 1920, this Court explained that seamen had thereby acquired a new and independent "right under the new rule to *compensatory* damages for injuries caused by negligence [that] is not an alternative of the right under the old rule to maintenance, cure and wages." *Pacific Steamship Co. v. Peterson*, 278 U.S. 130, 136-37 (1928) (emphasis added).

Jones Act damages are limited to actual pecuniary losses because "[w]hen Congress passed the Jones Act, the *Vreeland* gloss on [the Federal Employers' Liability Act or FELA], and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well." *Miles*, 498 U.S. at 32. *Vreeland* said that recovery under FELA was limited to pecuniary damages and "[a] pecuniary loss or damage must be

one which can be measured by some standard." *Michigan Central Railroad v. Vreeland*, 227 U.S. 59, 71 (1913). Thus, alleged losses that could not be so measured, such as for loss of society or grief, could not be recovered under FELA.

In quick succession, this Court twice further emphasized that FELA was intended only to compensate for a plaintiff's actual pecuniary loss. *American Railroad v. Didricksen*, 227 U.S. 145, 149 (1913) (FELA damages are "limited strictly to the financial loss thus sustained"); *Gulf, Colorado & Santa Fe Railway Co. v. McGinnis*, 228 U.S. 173, 175 (1913) (FELA "intended only to compensate . . . for the actual pecuniary loss" suffered).

C. Claims for unseaworthiness and Jones Act negligence are two distinct theories of liability on the same indivisible cause of action for the same compensatory damages.

A claim for unseaworthiness is merely an alternative theory of liability to a claim for Jones Act negligence on the very same cause of action. *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 325 (1927) (*res judicata* barred injured seaman's second suit for Jones Act negligence after he lost first suit alleging unseaworthiness because the two claims were a single indivisible cause of action); Gilmore & Black, § 6-38, at 383 (describing unseaworthiness and Jones Act counts as conjoined twin theories on a single cause of action).

As they are merely alternative theories of liability on the same cause of action, it necessarily follows that recoverable damages for unseaworthiness and Jones Act negligence cannot differ. Schoenbaum, *Admiralty and Maritime Law*, § 5:10, at 336, 337 (6th ed. 2018).

D. A seaman's right to receive maintenance and cure after an injury arises stands completely independent of claims for unseaworthiness and Jones Act negligence, and it has no statutory counterpart.

Maintenance and cure has ancient roots that long predate enactment of the Jones Act in 1920. The modern claim for unseaworthiness pressed in this case focused solely on the alleged injurious condition of the vessel did not even exist until the 1940's.

A seaman's right to maintenance and cure aims to save her or him from being left destitute after illness or injury strikes while in service to a vessel. "Maintenance" includes food and lodging at the expense of the injured seaman's vessel, and "cure" refers to medical treatment. *Townsend*, 557 U.S. at 413, citing *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001), and Gilmore & Black, § 6-12, at 267-68.

Seamen hold this separate and independent right to maintenance and cure in addition to their claims for compensatory damages under theories of unseaworthiness and Jones Act negligence. *Townsend*, 557 U.S. at 423-24. It is a stop-gap protective device and does not address compensatory damages.

The right to maintenance and cure attaches immediately upon injury or illness that arises while a seaman is in service to a vessel. That is completely unlike seamen's claims for compensatory damages where a condition of unseaworthiness or negligence must be proven before liability exists. Those claims for compensatory damages are very different animals with entirely distinct histories as discussed above.

Maintenance and cure differs from unseaworthiness in another critical way. Congress granted seamen a Jones Act negligence claim – a statutory counterpart to a general maritime unseaworthiness claim to compensate for the same injury. There exists no such statutory counterpart to a seaman's right to maintenance and cure, however.[3]

E. *Miles*, not *Townsend*, controls the unseaworthiness damages question presented in this case.

Townsend was not constrained by *Miles* because it only addressed willful and wanton failure to pay maintenance and cure, a right which stands separate and apart from a seaman's cause of action for compensatory damages on theories of unseaworthiness and Jones Act negligence. Congress never enacted any statutory analog for maintenance and cure. Thus, Congress did not speak to maintenance or cure at all, let alone limit the remedy for willful or wanton failure to pay maintenance and cure.[4]

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[3] The culpable conduct for which punitive damages were allowed in *Townsend* underscores another important distinction. Under *Townsend*, a vessel owner is exposed to punitive damages for willful or wanton refusal to pay maintenance and cure, a second level claims handling transgression that happens after an injury occurs. In contrast, here respondent seeks punitive damages for unseaworthiness itself – a species of liability without fault. Allowing punitive damages for willful or wanton claims handling misconduct is a world away from allowing them on a claim for liability without fault.

[4] Historical maritime cases cited in *Townsend* to support the conclusion that punitive damages were already an established remedy under general maritime law involved plunder, callous refusals to provide medical treatment to seamen in need, or other

The question presented here only involves unseaworthiness, however. That brings this case within the ambit of *Miles* because the Jones Act provides a claim for compensatory damages for personal injury or death just as unseaworthiness does under general maritime law. Schoenbaum, § 5:10, at 337-38.

F. *Miles* bars recovery of punitive damages on an unseaworthiness claim.

Townsend plainly stated that "the reasoning of *Miles* remains sound." *Townsend*, 557 U.S. at 420. Although *Miles* did not control the maintenance and cure claim presented in *Townsend*, it certainly applies to unseaworthiness claims.

Miles decreed that recoverable damages on a claim for unseaworthiness cannot exceed those available under a claim for Jones Act negligence. Because punitive damages cannot be recovered on a Jones Act claim, they likewise cannot be recovered on an unseaworthiness claim. Schoenbaum, § 5:10, at 336-39.

First, punitive damages are not measureable by any standard. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497-500 (2008) (observing that punitive damages are neither predictable nor consistent).[5] Thus, just like loss of society damages that were disallowed in *Miles*, they fail to meet the definition for pecuniary damages prescribed in *Vreeland*.

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egregious tortious acts. None appear to have awarded punitive damages for mere breach of a warranty of unseaworthiness.

[5] That *Baker* said when punitive damages can be recovered under general maritime law they should not exceed compensatory damages does not make them subject to any standard computation. It simply means there is an upper limit. Schoenbaum, § 5:10, at 336 n.36.

Second, punitive damages would not *compensate* for any actual loss – the standard for recoverable damages laid out by *Didricksen* and *McGinnis* as to FELA and *Peterson* as to the Jones Act. Instead, they punish and deter willful and wanton misconduct.[6]

G. It would be manifestly improper to allow more expansive remedies on a judicially created species of liability without fault than Congress allows in cases of harm caused by negligence.

Decisions of this Court have "undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care" such that unseaworthiness liability is completely divorced from fault concepts. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549-50 (1960) (reviewing cases).

That liability for unseaworthiness attaches irrespective of fault is the very point that led *Miles* to declare that "[i]t would be inconsistent with our place in

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[6] Routine demands for punitive damages are exploitive and confound adjudication meant to compensate for actual loss. *Lust v. Sealy*, 383 F.3d 580, 591 (7th Cir. 2004) (punitive damages claims are "potentially catastrophic for the defendants subjected to them and, in prospect, a means of coercing settlement"). *See also, R. Seamon, An Erie Obstacle to State Tort Reform*, 43 Idaho L. Rev. 37, 89-90 (2006) ("the mere pleading of a large punitive damage request can force a defendant to settle the case quickly in unfavorable terms. This dynamic can rise regardless of the merits of the claim. It is a particularly strong dynamic when the defendant's insurance company refuses to defend against punitive damages claims."). Allowing punitive damages on an unseaworthiness claim sets up that precise dynamic "regardless of the merits of the claim." *Id.*

the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Miles*, 498 U.S. at 32-33. That precept applies forcefully to the question presented in this case considering that punitive damages aim to punish and deter reprehensible conduct while notions of fault do not even factor into a seaman's modern claim for unseaworthiness.

Instead, the hair trigger for unseaworthiness liability is the condition of the vessel, regardless of whether any conduct of the owner is to blame. Permitting a seaman to recover punitive damages meant to punish and deter egregious conduct on a theory of liability without fault while the Jones Act limits the same seaman to compensatory and pecuniary damages upon proof of fault would impermissibly elevate this Court's place in the constitutional scheme, the hierarchy of which this brief addresses next.

II. CONGRESS HAS SUPERIOR AUTHORITY TO SHAPE AND LIMIT MARITIME LAW, AND THE COURTS MUST ABIDE BY STATUTORY LIMITS ON DAMAGES.

More than a century ago, this Court considered it "settled doctrine that . . . Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917).

Many decades later, *Miles* confirmed that Congress still holds superior authority when it comes to formulating maritime law. It further allowed that supplementing statutory remedies was permissible to

the extent that would achieve uniformity with statutory policy, but that

> we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

Miles, 498 U.S. at 27. From there, *Miles* followed the footsteps of earlier decisions applying the same precepts.

First was *Moragne*. It overruled *The Harrisburg*, 119 U.S. 199 (1886), which held general maritime law afforded no remedy for a wrongful death in the absence of an applicable state or federal statute. *Moragne*, 398 U.S. at 409. Taking its cue from Congress' creation in 1920 of wrongful death actions for most maritime deaths through the Jones Act and Death on the High Seas Act or DOHSA, *Moragne* filled a gap by providing a like claim for non-seamen deaths within state territorial waters. *Miles*, 498 U.S. at 23-28. Thus, *Moragne* supplemented to achieve uniformity between maritime statutes and general maritime law, but it exceeded no limits imposed by the Jones Act and DOHSA.

Then came *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), which held loss of society damages could not be recovered on a general maritime law wrongful death claim because they could not be recovered under DOHSA.

> Congress made the decision for us. DOHSA, by its terms, limits recoverable damages in wrongful death suits to "*pecuniary* loss

> sustained by the persons for whose benefit the suit is brought." 46 U.S.C. App. § 762 (emphasis added). This explicit limitation forecloses recovery for nonpecuniary loss, such as loss of society, in a general maritime action.

Miles, 498 U.S. at 31.

Miles further noted that *Higginbotham* rejected the argument that general maritime law should supplement the remedies afforded by maritime statutes. "[I]n an 'area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.'" *Id.*, quoting *Higginbotham*, 436 U.S. at 625.

The key principles and logic of *Higginbotham* controlled this Court's decision in *Miles*. Congress has addressed what damages are recoverable in the area of maritime personal injury and death, and "'when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless.'" *Miles*, 498 U.S. at 31, quoting *Higginbotham*, 436 U.S. at 625.

Since *Miles*, this Court has twice reaffirmed that maritime personal injury and death claims under maritime statutes and general maritime law should be coextensive. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996), ruled that non-pecuniary loss of society damages could not be recovered for wrongful death of a commercial airline passenger under general maritime law where Congress limited damages to pecuniary losses under DOHSA. *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 815 (2001), found "no rational basis . . . for distinguishing

negligence from seaworthiness" and recognized a general maritime law negligence claim for death of a vessel repairman, just as maritime law recognizes seamen's personal injury and death claims for unseaworthiness and both the Jones Act and DOHSA allow claims for negligence causing death.

Moragne, *Higginbotham*, *Miles*, *Zicherman*, and *Garris* together teach several lessons. One is that a hierarchy exists in the constitutional scheme that places superior authority with Congress to set maritime law policy. A second is that general maritime law remedies should be coextensive with their statutory counterparts. And a third is that courts must abide by whatever limits are included in the statutes that Congress enacts. "An admiralty court is not free to go beyond those limits" that are included in the Jones Act and DOHSA. *Miles*, 498 U.S. at 24.[7]

Here Congress spoke directly through the Jones Act to the very cause of action that respondent pursues on a theory of unseaworthiness. Because he seeks a more expansive remedy under general maritime law than what the Jones Act would allow on the same cause of

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[7] The allowance of punitive damages for willful refusal to pay maintenance and cure in *Townsend* did not abridge or violate Congressional policy because no statute spoke to the maintenance and cure issue presented there. The Jones Act and DOHSA address liability for maritime injury and death, not the separate and independent obligation of a vessel owner to pay maintenance and cure to a seaman after injury occurs. *Townsend*, 557 U.S. at 420-21; *Peterson*, 278 U.S. at 136-37 ("the right under the new rule to compensatory damages for injuries caused by negligence is not an alternative of the right under the old rule to maintenance, cure and wages – which arises, quite independently of negligence, when the seaman falls sick or is injured in the service of the ship").

action, *Miles* applies and disallows recovery of punitive damages.

III. UNIFORMITY LIKEWISE COMMANDS A DECISION THAT SEAMEN CANNOT RECOVER PUNITIVE DAMAGES FOR UNSEAWORTHINESS.

Uniformity between statutory pronouncements and general maritime law has been a consistent force driving decisions of this Court. The holding of *Miles* itself strongly illustrates this point.

> Cognizant of the constitutional relationship between the courts and Congress, we today act in accordance with the *uniform plan of maritime tort law Congress created in DOHSA and the Jones Act*. We hold that there is a general maritime cause of action for the wrongful death of a seaman, but that damages recoverable in such an action do not include loss of society.

Miles, 498 U.S. at 37 (emphasis added).

Uniformity likewise bolstered the decision in *Moragne* to overrule *The Harrisburg* and create a general maritime wrongful death cause of action.

> This result was not only consistent with the general policy of both 1920 Acts favoring wrongful death recovery, but also effectuated "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.' *Moragne*, *supra*, 398 U.S. at 402, quoting *The Lottawanna*, 21 Wall. 558, 575 (1875)."

Miles, 498 U.S. at 27.

This Court has clearly identified the Jones Act as the leading maritime tort statute to which general maritime law should conform. "While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field. Foremost among those enactments in the field of maritime torts is the Jones Act . . .." *American Dredging Co. v. Miller*, 510 U.S. 443, 455-56 (1994).

Just as this Court announced uniform rules as to seamen's unseaworthiness claims in *Moragne*[8] and *Miles* to conform to maritime tort statutes, here it should likewise announce a uniform rule that seamen cannot recover punitive damages for unseaworthiness just as they cannot recover them for Jones Act negligence.

IV. LEADING MARITIME SCHOLAR PROFESSOR SCHOENBAUM CONCLUDED IN HIS TREATISE THAT SEAMEN CANNOT RECOVER PUNITIVE DAMAGES FOR UNSEAWORTHINESS.

Professor Thomas J. Schoenbaum has spent much of his professional life in the practice, teaching, and research of admiralty and maritime law. He has taught law since 1968 and has written many books and articles on admiralty and maritime law. His major work *Admiralty and Maritime Law* is a leading authority – the treatise so often cited by state and

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[8] The deceased longshoreman in *Moragne* was a "Sieracki seaman" as to whom unseaworthiness could be claimed at that time. In 1972, Congress amended the Longshore and Harbor Workers' Compensation Act to eliminate longshoremen claims for unseaworthiness.

federal courts, including by this Court. *E.g.*, *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837-38 (1996).

He objectively analyzed the very question presented by this case in the sixth edition of his treatise published in 2018. His detailed analysis led him to conclude that "Jones Act seamen may not recover punitive damages in suits for unseaworthiness against their employers or against vessel owners or operators." Schoenbaum, § 5:10, at 335 and 336-39.

Professor Schoenbaum framed the general question as "what is the proper reach of *Miles* after *Baker* and *Townsend*?" He recognized that *Baker* and *Townsend* express a general rule that punitive damages are available in appropriate general maritime law cases. But he further observed that *Townsend* did not overturn or disturb the holding and reasoning of *Miles*. He noted that *Townsend* not only said "[t]he reasoning of *Miles* remains sound," but also "expressly agreed, stating: it would be 'illegitimate to create common law remedies that [exceed] those remedies statutorily available under the Jones Act and DOHSA.'" *Id.* at 335, quoting *Townsend*, 557 U.S. at 420.

As to punitive damages for Jones Act seamen, Professor Schoenbaum first determined that *Miles* had effectively decreed that in cases of both seamen personal injury and death, damages for general maritime law unseaworthiness are the same as those for Jones Act negligence. *Id.* at 336. From there, he turned to the pecuniary damages limitation expressed in *Miles* to analyze whether punitive damages are pecuniary. He said the clear answer to this question was "no" because punitive damages are not capable of any standardized measurement – just as *Baker*, lower court decisions, and learned commentary agreed. *Id.* Consequently, Professor Schoenbaum said "it appears

that *Miles* applies to exclude the recovery of punitive damages by Jones Act seamen in suits against their employers or a vessel for unseaworthiness." *Id.* at 336-37.

But Professor Schoenbaum did not end his analysis there. He next addressed whether his conclusion squared with *Townsend*. He said "the answer to this question is yes, on several grounds." *Id.* at 337.

First, he noted that tort damages did not apply to maintenance and cure (the right at issue in *Townsend*) and judicial authority instructed that tort damages for Jones Act negligence and unseaworthiness claims were identical. Second, Professor Schoenbaum determined that when Congress enacted the Jones Act as a supplemental tort remedy in 1920, it was well aware of a seaman's pre-existing right to maintenance and cure but it "could not have foreseen" the subsequent radical development of unseaworthiness and "the complications this caused." Third, he contrasted maintenance and cure's ancient origins in general maritime law against the relatively recent development in the 1940's of the modern unseaworthiness claim. Fourth, he explained that the Jones Act was passed to enhance, not replace seamen's preexisting right to maintenance and cure, while unseaworthiness was developed to provide seamen an alternative ground to prove liability, "but not to provide new remedies." *Id.* at 337-38.[9]

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[9] Professor Schoenbaum explained in his treatise that complete uniformity between all classes of claims does not exist because some claims fall within the ambit of the Jones Act and DOHSA while others do not. Thus, recoverable damages in the case of a cruise passenger are not limited by the Jones Act while those in the case of a seaman plainly are. Such disparate treatment is the product of how Congress exercised its constitutional power

Professor Schoenbaum closed his analysis by explaining how the Ninth Circuit below and the Washington Supreme Court in *Tabingo v. American Triumph LLC*, 391 P.3d 434 (2017), *cert. denied*, 138 S. Ct. 648 (2018), both incorrectly analyzed the question. He said those courts mistakenly applied *Townsend* and improperly distinguished *Miles*, failing to adequately analyze *Miles* and its rulings excluding non-pecuniary damages and mandating uniform maritime tort remedies. *Id.* at 338-39.

CONCLUSION

The Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

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to sculpt maritime claims and policy. It would be the place of Congress to eliminate such disparities, not the courts. Schoenbaum, § 5:10, at 338.

ADDENDUM

ADDENDUM

ALASKAN LEADER FISHERIES LLC

Alaskan Leader Fisheries LLC is one of the most progressive, innovative, and vertically integrated "hook and line" fishing companies in Alaska. It knows that its most valuable resources are the more than 100 incredible crewmembers who work hard and live on their vessels. Alaskan Leader Fisheries is known for its commitment to providing comfortable accommodations, a safe work environment, and a network of support for those crewmembers.

It operates four super long liners year round in the Bering Sea, using the latest technology for harvesting and processing Alaska seafood. Built in the United States and operated in compliance with Coast Guard requirements, they are the newest, safest, and cleanest vessels in the long line fleet. They proudly fly the Maltese Falcon Cross – the symbol of inspection excellence from the American Bureau of Shipping.

COASTAL MARINE FUND

Coastal Marine Fund is an unincorporated association licensed to do business in the State of Washington. Its members include about 350 owners of "traditional" fishing vessels – typically under 100 feet long and operated by long-time fishing families. These vessels fish along and off the coasts of Alaska, Washington, Oregon, California, and, to a lesser extent, the East Coast. The men and women who serve aboard Coastal Marine Fund member vessels are classic commercial fishermen.

Coastal Marine Fund uses group buying power to procure marine insurance for members at favorable premium rates. It limits membership to vessel owners

with better than average loss records to maintain strong buying power and keep insurance premiums as low as possible.

FISHERMEN'S FINEST, INC.

Based in Kirkland, Washington, Fishermen's Finest, Inc., provides safe, good paying careers for more than 240 employees in Alaska and Washington State. It strongly advocates progressive safety standards in US offshore fishing operations.

Fishermen's Finest owns and operates three US factory catcher processor ships. They harvest and process approximately 120 million pounds of fish per year in US EEZ waters of the Bering Sea and North Pacific Ocean, outside state territorial waters. Each ship is either load lined or classed, and operates with up to 43 crewmembers for 10 to 11 months each year.

GLOBAL SEAS LLC

Global Seas LLC is a private management company with headquarters in Seattle, Washington. Since forming in 2001, it has grown and evolved into an internationally diverse entity. Known for combining experience and knowhow from the past and with technology of the future, Global Seas has a variety of marine businesses lines that include fish harvesting, fish processing, and marine research.

Global Seas views it as a mission to provide its crews "with the most advanced, dynamic and quality vessels" that are safe, efficient, and well maintained. And that it does.

Global Seas operates a variety of fishing trawlers on both the East and West Coasts. Two recent additions to the Alaska fishing fleet are equipped with the latest technology, safety equipment, and exceptional living

spaces for the crew. Two other trawlers are regularly updated to exceed the industry standards.

It also owns and manages several research vessels. Global Seas has equipped them with state-of-the-art full ocean mapping capability. Surveys and research conducted by these vessels provide critical data that the maritime industry can use to make operations at sea safer and more predictable.

GOLDEN ALASKA SEAFOODS, LLC

Golden Alaska Seafoods is a Washington limited liability company that operates a 305 foot long fish processing vessel M/V GOLDEN ALASKA in waters off the coasts of Alaska, Washington, and Oregon. The vessel does not catch fish but takes deliveries from a number of catcher vessels whose crews, in turn, depend on the GOLDEN ALASKA for their living. As such, the vessel is commonly referred to as a "mothership."

The GOLDEN ALASKA carries around 150 hard-working crewmembers of various nationalities, religions, and backgrounds who compose a true cultural melting pot. They live on the vessel at sea for months at a time, with brief stops in ports every 10 days or so to unload product and replenish supplies. Golden Alaska works cooperatively with the crew to make their floating work place and home a safe environment.

NORTH STAR FISHING COMPANY LLC

North Star Fishing Company, founded in 1987, is based in Seattle, Washington. Operating a fleet of four trawl catcher processors in Alaska, it fishes for a variety of species. It is known for its commitment to

providing sustainable catch, harvesting natural, wild fish to feed a hungry world.

North Star Fishing strives every day to maintain an environmental balance that promotes healthy and productive oceans. For example, the company prides itself on working with scientists and using modified fishing gear to reduce adverse effects on the seafloor habitat.

It takes a team effort to safely achieve sustainable catch in the rough and unforgiving environment of Alaskan waters – something North Star Fisheries has successfully achieved for many years. Crewmembers of North Star Fishing vessels proudly participate in the company's conservation efforts. In turn, the company proudly employs its crewmembers, and it makes their safety a priority.

NORTH STAR INSURANCE SERVICES, LLC

North Star Insurance Services offers a broad range of insurance coverage options to bring peace of mind to fishing vessel operators, from small mom-and-pop operations to large factory trawlers. With locations both in Seattle, Washington, and Fairhaven, Massachusetts, the company is familiar with the unique needs of the fishing industry on both coasts.

North Star Insurance knows that safety is a top priority for its clients wherever they fish. Its clients promote safe practices and continuously work to improve safety to minimize injuries. That, in turn, helps keep insurance premiums as low as possible.

When mishaps do occur, the insurance services that North Star Insurance offers help vessel owners handle resulting claims, consider steps to try to prevent such events, and ultimately keep insurance premiums low.

North Star Insurance supports its clients' desire for uniform maritime law that fairly compensates injured crewmembers for their actual losses when liability exists.

OCEAN PEACE, INC.

Ocean Peace is located in in Seattle, Washington, and operates a fleet of four large factory trawlers 215 to 230 feet long and one catcher vessel. The company employs hundreds of hardworking crewmembers who catch, process and freeze fish on the vessels, which operate seven days each week for 24 hours per day from January to November each year.

Unquestionably, the extreme conditions of the Bering Sea and Aleutian Islands present a unique environment for working and living at sea. Success for all involved requires dedication and hard work, with an emphasis on safety.

Ocean Peace considers crew safety the highest priority on all of its vessels. It regularly updates its safety practices and work spaces on board the vessels and openly communicates with crewmembers regarding any safety concerns they may have. In addition to conducting training and drills as required by the Coast Guard, Ocean Peace requires all crewmembers to attend safety courses and crew safety meetings prior to each trip.

O'HARA CORPORATION

For over 110 years, O'Hara Corporation has withstood the test of time operating fishing vessels in both the Atlantic and Pacific Oceans. Francis J. O'Hara began building his sailing fleet in 1903 starting in Boston, Massachusetts.

After four generations, the business has grown. From setting a seine net off the coast of Maine for herring, to participating in the scallop fishery out of New Bedford, Massachusetts, to operating factory processing vessels in the North Pacific, O'Hara has diversified into a multinational family business. While its roots are still planted in Maine where O'Hara maintains significant marine and land-based operations, its catcher processor vessels that fish in waters of the Bering Sea, the Aleutian Islands, and the Gulf of Alaska are the heart of the company. O'Hara continuously invests in safety training for employees and crewmembers working ashore and at sea.

TRIDENT SEAFOODS CORPORATION

Trident Seafoods is one of the largest seafood companies in North America. The company was founded in 1973 by fisherman Chuck Bundrant when he built and skippered the first modern crab catcher/processor vessel to operate in the Bering Sea.

The company now owns trawl catcher/processor vessels, trawl catcher vessels, floating processing vessels, crab catcher vessels, freighters, and fish tenders that operate throughout waters off Alaska. It also owns shore-based seafood processing facilities in some of Alaska's most remote coastal areas.

Trident Seafoods employs thousands of hard working individuals at sea and on land. In addition, it partners with thousands of independent and dedicated Alaskan fishermen who run family-owned boats. Led by executives who began their careers fishing and understand firsthand what it means to work at sea, Trident Seafoods strives to provide a safe and secure work environment for crewmembers on all of its vessels.

UNITED CATCHER BOATS ASSOCIATION

United Catcher Boats or UCB is a non-profit trade association established in 1993 that serves two main purposes. It provides critical information to its member vessel owners, such as updated fishery regulations and rule making information at the regional and national levels. UCB also represents vessel owners, giving them a unified voice to air their concerns and positions regarding fisheries management and policy when addressing various government agencies and organizations.

UCB members own 68 vessels that trawl for ground fish in Bering Sea, Gulf of Alaska, and West Coast commercial fisheries. They deliver catch to motherships or shore-based facilities for processing. Safety has always been important to UCB members. UCB informs members of changes to safety rules and regulations that apply to their vessels as soon as possible so members can be the first ones to implement those changes as needed.

UNITED STATES SEAFOODS, LLC

"To work at sea is a thing of pride." These words, spoken by Matt Doherty, the president of the company, say it all. Starting as a fisherman in Boston, Massachusetts, Mr. Doherty's origins are humble. Over the years, he and his partners developed a fishing company in the Pacific Northwest that currently operates nine vessels and employs over 700 people. The United States Seafoods fleet ranges from the 98 foot catcher vessel ALASKA BEAUTY that employs five crewmembers to the 295 foot factory trawler SEAFREEZE ALASKA that employs 85.

In this era of consolidation and highly capitalized fisheries, Mr. Doherty is a one of the few remaining

fishermen founders – he built the company boat by boat. It comes as no surprise that when the vessels are in port, Mr. Doherty goes on board every day, doing tasks and chores alongside his crew.

In this company, crewmembers are not merely employees. They are family and are treated as such. Mr. Doherty takes pride in the company and his family of crewmembers. He knows and understands that working at sea, months at a time, in an unforgiving environment is a hard and prideful experience not meant for all. But for those proud individuals who choose to do it, United States Seafoods provides the safest environment onboard its vessels. After all, safety of the family is one of the most important goals.

No. 18-266

IN THE
Supreme Court of the United States

THE DUTRA GROUP,
Petitioner,

v.

CHRISTOPHER BATTERTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ["AAJ"] is a voluntary national bar association whose members primarily represent plaintiffs in personal injury cases, as well as employment suits, civil rights actions, and consumer rights cases. AAJ is the world's largest trial bar. Members of AAJ's Admiralty Law Section frequently represent injured seamen and their families.

AAJ believes that the historic role of the admiralty courts in protecting the rights of those who go down to the sea supports the availability of punitive damages to punish owners who willfully disregard their obligation to provide a seaworthy vessel and to deter others from doing so as well.

Owners who recognize the possibility of such awards will invest in providing seafarers with safer places to work.

SUMMARY OF ARGUMENT

1. The Dutra Group and its supporting amici urge this Court to deny the punitive damages remedy in unseaworthiness cases for public policy reasons that this Court has already found wanting. They raise a false specter of increased costs for the U.S. maritime industry that will render it

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondent have consented to the filing of this brief.

uncompetitive with foreign rivals. In essence, they contend that immunity for reprehensible misconduct should be countenanced in the name of commerce.

The fact is that Petitioner's fears of outrageous and unpredictable punitive awards have no basis in fact. They echo the unfounded arguments that have been pressed for decades in a concerted public relations campaign demonizing punitive damages as a threat to the American economy.

Scholars looking into these claims have found them to be built largely on anecdote, imagination, and exaggeration. Nearly four decades of empirical research and actual case data consistently confirm that juries return punitive-damage verdicts infrequently, that the size of punitive damage verdicts has remained remarkably consistent and relatively modest, that jury decisions on punitive damages are very similar to judges' decisions, and that punitive damages are closely related to the compensatory damages, rendering them rationally predictable.

In 2008, this Court had occasion to review that research, which included a multi-year joint project of the U.S. Department of Justice's Bureau of Justice Statistics and the National Center for State Courts, a review of jury verdicts by the General Accounting Office, studies by researchers at the American Bar Foundation, multiple studies by the RAND Institute of Civil Justice, an important work by Professor William Landes and Judge Richard Posner, and rigorous empirical research by university-based scholars.

This Court found that this disinterested scholarship undercut the vocal criticism of punitive damages: Juries have "not mass-produced runaway awards," "the median ratio of punitive to compensatory awards has remained less than 1:1," there has been no "marked increase in the percentage of cases with punitive awards over the past several decades," and jury awards of punitive damages "relate strongly to [the] compensatory award." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497-98 (2008).

Subsequent empirical studies have confirmed these findings. Scholars also addressed this Court's concern regarding the unpredictability of punitive awards, clarifying their analysis to demonstrate that such concerns are not warranted.

2. The further argument advanced by Petitioner and supporting amici – that the mere fear of large, out-of-the-blue punitive damage awards, will have an *in terrorem* effect, pressuring unseaworthiness defendants to expensively settle meritless cases – is likewise baseless.

No persuasive support is offered for this proposition. The cited authorities focus on the special difficulties surrounding class actions or mass tort litigation, or simply fail to support the assertion that routine or unpredictable punitive awards actually exert a "shadow effect" on settlement decisions.

This absence of credible evidence is all the more surprising in view of the fact that maritime law has provided real-world conditions to test Petitioner's theory. First, punitive damages have long been available in general maritime law actions. Secondly, this Court ten years ago held that punitive

damages are available in actions for maintenance and cure. Third, several federal circuits have permitted recovery of punitive damages in unseaworthiness cases for several decades. Neither Petitioner nor supporting amici representing the maritime industry present any evidence that the availability of punitive damages has caused an *in terrorem* effect.

In fact, a number of empirical studies demonstrate that there is no significant "shadow effect" that coerces defendants to settle meritless cases. This Court has itself taken notice of this research. Subsequent analyses of data collected by the Bureau of Justice Statistics and the National Center for State Courts has confirmed this finding. Even the study cited by Petitioner does not establish the purported impact on settlements.

Petitioner's professed fear of random, undeserved punitive verdicts is baseless and rooted in the mistaken notion that plaintiffs can simply ask for punitive damages in a personal injury complaint and hope that the jury will return a generous award irrespective of the merits. In reality, punitive damages may be awarded, even in strict liability actions, only where plaintiff has established willful and wanton, outrageously reprehensible conduct. Moreover, pleading requirements demand that plaintiffs present sufficient evidence of such egregious misconduct before the jury can be asked to consider punitive damages. The experience of punitive damage awards in product liability, such as the Ford Pinto case, demonstrates the substantial burden plaintiffs must meet before reaching the jury.

The asserted fear of large, unpredictable punitive damage award is not supported by either the process of presenting such cases to juries nor the empirical data of jury decisions. Instead, the perceived risk of punitive damages is based on the advocacy of tort reform proponents demonizing punitive damages. It provides no proper policy basis for denying punitive damages in unseaworthiness personal injury cases.

3. The availability of the traditional recovery of punitive damages in cases of a defendant's willful and wanton disregard for its safety obligations is not a threat to the wellbeing of the maritime industry. Rather, it provides a financial incentive for vessel owners to attend to known dangers aboard their vessels.

Punitive damages need not be awarded often to serve this socially beneficial function, and they remove the competitive advantage some may see in requiring seamen to work under dangerous conditions.

The deterrent effect of punitive damages has been demonstrated in product liability, where manufacturers overwhelmingly have responded to punitive damage awards by improving or discontinuing unreasonably dangerous products. Similarly, for many years some employers willfully and unreasonably denied maintenance and cure to injured seamen. Following this Court's decision that punitive damages may be awarded in such cases, practitioners have noted that employers are more willing to meet their obligations to pay valid claims for maintenance and cure.

Nor is there any merit to the argument that punitive damages may overdeter defendants. Such an argument makes no more sense than claiming that fines for reckless driving will overdeter careful driving. Punitive damages aim to punish and deter outrageous and reprehensible misconduct. There can be no overdeterrence of conduct that has no societal benefit.

ARGUMENT

I. Petitioner Greatly Exaggerates the Adverse Impact Punitive Damages in Personal Injury Actions Has on the Maritime Industry and the American Economy Generally.

Aside from the revisionist history it relates about the availability of punitive damages under maritime law,[2] the Dutra Group and its supporting

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[2] This Court described the long history of punitive damages' availability for maritime claims and the place of maintenance and cure within it in *Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 410-15 (2009). This Court held that "[h]istorically, punitive damages have been available and awarded in general maritime actions." *Id.* at 407. The Dutra Group attempts to set aside that history by claiming an independent history for seaworthiness claims that does not overlap or draw from the history it concedes that allows punitive damages for maintenance and cure. Petitioner's Brief ("Pet. Br.") 22. Yet, unseaworthiness claims are general maritime actions that predate the Jones Act, *Townsend*, 557 U.S. at 419, and were left undisturbed, along with other maritime claims, by the enactment of the Jones Act as a separate remedy that may be pursued. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 29 (1990).

amici advance a public policy rationale for denying punitive damages in unseaworthiness cases that this Court has already found wanting. They raise a false specter of increased costs for the maritime industry that will end up rendering the U.S. maritime industry uncompetitive as compared with foreign rivals who do not operate under a civil justice system as equally protective of the safety of seagoing employees as ours. The essence of that assertion, framed differently, is that permitting punitive damages for egregious misconduct would put them at a competitive disadvantage in maritime commerce, as though reprehensibility should be countenanced in the name of commerce.[3]

The rhetorical arguments The Dutra Group and its amici muster amount to little more than an exaggerated and unwarranted fear of punitive damages that is no different from allowing a heckler to veto the exercise of free speech as a reason to limit First Amendment freedoms. These fears, however, are baseless. Neither the incidence of actual punitive damage awards nor their purported "shadow effect" on personal injury settlements provides any sound policy basis for immunizing vessel owners from punitive damages where their egregious misconduct has caused injury. Indeed, such immunity undermines the financial incentive for safety.

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[3] Punitive damages are generally available only in cases of intentional torts involving malice or substantial recklessness. *See* Dan B. Dobbs, Law of Remedies: Damages-Equity-Restitution 310-33 (2d ed. 1993).

A. *Punitive Damage Awards Are Relatively Infrequent, Moderate in Amount, and Rationally Predictable, as this Court Has Recognized.*

History, we are often reminded, repeats itself – and the public policy arguments assayed by Petitioner and its amici attempt to support their advocacy with arguments and assertions this Court has examined and rejected. The arguments have their basis in a concerted public relations campaign begun decades ago with the aim of curbing punitive damages.[4] Eventually, members of this Court took note of the claims and began to worry that frequent "skyrocketing" punitive damage awards plagued the civil justice system and resulted in an adverse impact on the economy, commerce, and product innovation. *See, e.g., Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting).[5] The arguments made then are the

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[4] *See* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 14-16 (1990) (describing press kits and other public relations tools using purposely fractured versions of horror stories and anecdotes about jury verdicts involving punitive damages, as well as the misuse of aggregate data on the frequency and size of awards to change attitudes); Andrew L. Frey & Evan M. Tager, *Punitive Damages, the Constitution, and Due Process*, Recorder (Sept. 9, 1993) (utilizing those materials to make a case for judicial intervention).

[5] This dissent relied, in part, on a book for its concern that manufacturers abandoned new products out of fear of punitive damages. 492 U.S. at 282 (citing Peter W. Huber, Liability: The Legal Revolution and Its Consequences 152-71 (1988)). The book was later described as "polemical," rather than based in fact. *See* Gary Edmond & David Mercer, *Trashing "Junk Science"*, 1998 Stan. Tech. L. Rev. 3, 4 (1998) (describing Huber's contributions to the literature as "polemical works").

same ones The Dutra Group and its amici put forth today, relying on many of the same articles that fueled the earlier campaign, to claim that the mere availability of punitive damages will have "adverse consequences . . . for maritime commerce, the environment, and national security." Pet. Br. 34.

However, scholars understood that the effort to portray an outsized punitive-damage problem was built largely on imagination and ignored the best available empirical research. In fact, there is now nearly four decades of consistent research confirming that juries return punitive-damage verdicts infrequently, that the size of punitive damage verdicts has remained remarkably consistent and relatively modest, and that judges decide punitive damages using similar criteria and consistently with jury assessments, rendering them rationally predictable.

B. This Court Has Found Criticism of Punitive Damages, Like Those Set Forth by Petitioner, Undercut by Empirical Studies.

By 2008, when this Court had occasion to examine that literature, the body of research rebutting claims of a punitive-damage problem included a multi-year joint project of the U.S. Department of Justice's Bureau of Justice Statistics and the National Center for State Courts,[6] a review of jury

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[6] Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties*, Bureau of Justice Statistics Special Report NCJ 154346 (July 1995); Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 1996: Civil Trial Cases and Verdicts in Large Counties, 1996*, Bureau of Justice Statistics Bulletin, NCJ 173426 (Sept. 1999); Bureau

verdicts by the General Accounting Office,[7] studies by researchers at the American Bar Foundation,[8] multiple studies by the RAND Institute of Civil Justice,[9] an important work by Professor William

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of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2001: Civil Trial Cases and Verdicts in Large Counties, 2001*, NCJ 202803 (Apr. 2004); Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2001: Tort Trials and Verdicts in Large Counties, 2001*, NCJ 206240 (Nov. 2004); Bureau of Justice Statistics, U.S. Dept. Of Justice, *Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001*, NCJ 208445 (Mar. 2005).

[7] U.S. General Accounting Office, *Product Liability Verdicts and Case Resolution in Five States*, GAO/HRD-89-90, at 24, 29 (Sept. 1989) (Punitive damages were awarded in 23 of 305 cases decided in five states.).

[8] Stephen Daniels & Joanne Martin, *Civil Juries and the Politics of Reform* 214 (1995) ("[P]unitive damage award activity suggests . . . the need for . . . skepticism with regard to claims about the increasing frequency of such awards."); Daniels & Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1 (1990).

[9] James S. Kakalik et al., *Costs and Compensation Paid in Aviation Accident Litigation* 27 (1988) ("[P]unitive damages were not paid on any of the 2,198 closed cases."); Erik Moller, *Trends in Civil Jury Verdicts Since 1985*, 33 (1996) ("[P]unitive damages are awarded very rarely."); Mark Peterson, Syam Sarma, & Michael Shanley, *Punitive Damages: Empirical Findings* 10 (1987) (Fewer than seven punitive damages awards per year in Cook County and fewer than six in San Francisco from 1960-1984.).

Landes and Judge Richard Posner,[10] and rigorous empirical research by university-based scholars.[11]

Based on that disinterested scholarship, this Court recognized that the frequent "audible criticism [of punitive damages] in recent decades" was undercut by "the most recent studies." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497 (2008). In fact, this Court concluded, after reviewing a "survey of the literature," "that discretion to award punitive damages has not mass-produced runaway awards," that "the median ratio of punitive to compensatory awards has remained less than 1:1," and that there was no "marked increase in the percentage of cases with punitive awards over the past several decades." *Id.* at 497-98. As one set of researchers this Court cited repeatedly stated, "[m]isperceptions about juries and punitive damages are especially strong." Eisenberg, 87 Cornell L. Rev. at 745. In contrast to the claims propagated by opponents of punitive

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[10] William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law*, 304-07 (1987) ("[The] insignificance of punitive damages in our sample is evidence that they are not being routinely awarded.").

[11] *See, e.g.*, Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 Cornell L. Rev. 743, 745 (2002); Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 Ga. L. Rev. 1049, 1094 (2000) ("punitive damages currently are not a significant factor in personal injury litigation in Georgia."); Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 Harv. J. Legis. 487, 487 (2001) (finding punitive damages in Florida to be "strikingly low."); Michael Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wisc. L. Rev. 15, 17-19.

damages, "juries rarely award such damages, and . . . tend to award them in intentional misconduct cases. When juries do award punitive damages, they do so in ways that relate strongly to compensatory award." *Id.* Based on the empirical literature, this Court concluded that the studies demonstrate "overall restraint" in the assessment of punitive damages. *Baker*, 554 U.S. at 499. Interestingly, using the same data sets, researchers found no significant difference in punitive damage assessments made by judges from those made by juries. Eisenberg, 87 Cornell L. Rev. at 763. *See also* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. of Empirical Legal Stud. 263 (2006).

C. More Recent Studies Also Undermine Criticism of Punitive Damages.

Neither The Dutra Group nor its amici muster any post-*Baker* studies that might indicate a new and different trend from that established by the empirical literature this Court studied in *Baker*. Although new studies are sparse, the ones that exist confirm the conclusions of older ones: that punitive damages are not "out of control" or "in need of reform." Theodore Eisenberg, *The Empirical Effects of Tort Reform*, *in* Research Handbook on the Economics of Torts 543 (Jennifer Arlen, ed. 2013) [hereinafter "Research Handbook"]. That more recent literature also demonstrates that punitive damage assessments strongly track compensatory awards, indicating they remain "reasonably sober [and] modest in size." Theodore Eisenberg and Michael Heise,

Judge-Jury Differences in Punitive Damages Awards: Who Listens to the Supreme Court?, 8 J. of Empirical Legal Stud. 325, 325, 335 (2011). Moreover, the size of punitive damage awards "remain relatively stable over time." *Id.* at 325, 339.[12] Indeed, as Professor Sharkey writes, it is not debatable that "punitive damages are awarded infrequently." Catherine M. Sharkey, *Economic Analysis of Punitive Damages: Theory, Empirics, and Doctrine*, *in* Research Handbook, at 500. The data continues to show few awards of greater than $1 million, while nearly 60 percent of all punitive damages awarded were less than $100,000. Eisenberg & Heise, 8 J. of Empirical Legal Stud. at 334.

The one concern about punitive damages, or "real problem," that this Court expressed in *Baker* was the "stark unpredictability of punitive awards." 554 U.S. at 499. The same researchers that this Court relied upon in *Baker* for its understanding of the literature undertook to examine that question, using the same data that generated the concern. They found that the "mean and standard deviation relied on by the Court do not support its concern about unpredictability," partially because the Court relied on statistical summaries that did not account

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[12] This study did find a modicum of differences in the newest data between judge and jury assessments of punitive damages in particular kinds of cases, which was not evident in previous datasets. The study found that judges awarded punitive damages at a slightly higher rate in personal injury cases, while juries somewhat more frequently awarded them in nonpersonal injury cases. *Id.* at 352, 348. The authors attributed the variations detected largely to "[s]ystematic differences in the streams of cases that wind up in front of judges and juries. *Id.* at 328.

for the seriousness of the injury and thus the size of the compensatory damages. Theodore Eisenberg, Michael Heise, and Martin T. Wells, *Variability in Punitive Damages: Empirically Assessing Exxon Shipping Co. v. Baker*, 166 J. of Institutional and Theoretical Econ. 5, 18 (2010). Thus, the different awards in otherwise similar cases were entirely explicable by the low or high compensatory awards given for starkly different injuries. *Id.* at 20. Instead, this study, as well as the bulk of scholarly work, points to consistency in the award of punitive damages. *Id.* at 21.

Simply put, the "audible criticism" of punitive damages that The Dutra Group and its amici dredge up from the past was found wanting by this Court before and nothing new warrants reexamination of that finding today. *See Baker*, 554 U.S. at 497.

II. The Purported "Shadow Effect" of Punitive Damages Has No Basis in Reality.

A. Petitioner and Supporting Amici Rely on Unsupported Assertions that Fear of Unpredictable and Large Punitive Damage Verdicts Forces Defendants to Settle Meritless Cases.

The Dutra Group largely ignores the mountain of empirical data establishing that punitive damage verdicts are rare, modest in amount, and closely corelated with the compensatory damages awarded. Yet, Petitioner advances the argument that defendants' fear of large, out-of-the-blue punitive damage awards, will "have an *in terrorem* effect

on unseaworthiness defendants, pressuring them to settle weaker cases or to settle for more money than they otherwise would." Pet. Br. 35. These settlements, it is asserted, will increase costs for consumers, harm the maritime industry, and perhaps even undermine the nation's military readiness. Pet. Br. 38-39.

Petitioner's supporting amici echo these contentions. *See. e.g.*, At-Sea Processors Ass'n Br. 7 ("The predictable effect of making punitive damages available . . . will be to coerce maritime defendants into settling even dubious unseaworthiness claims," leading to higher prices for consumers.); Dredging Contractors Br. 19 ("[A]llowing punitive damages to attach to an unseaworthiness claim would substantially increase the costs to shipowners through higher damage awards [and] higher settlements."); American Maritime Ass'n Br. 10 ("Forcing these companies to pay (or to be threatened with) punitive damages could cripple the industry and, by extension, the national defense.").

The Dutra Group and supporting amici offer no factual support for either their unwarranted fear of large and unpredictable punitive damage awards or for the notion that defendants routinely settle meritless cases to avoid such awards. The authorities cited by Petitioner focus on the pressures defendants face in large class actions and mass torts. *See* Pet. Br. 35 n.12 (citing, for example, James Henderson, *The Impropriety of Punitive Damages in Mass Torts*, 52 Ga. L. Rev. 719 (2018)). *See also* U.S. Chamber of Commerce Br. 10 (citing several of the same sources). The issues presented by class actions and mass tort litigation have little bearing on an

individual injured seaman's personal injury lawsuit arising out a vessel's unseaworthiness.

The U.S. Chamber cites Professor Eisenberg and his co-authors for the proposition that perhaps "thousands of cases" settle on different terms "because of the possibility of punitive damages." *Id.* at 11 (citing Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623, 625 (1997). *See also* At-Sea Processors Ass'n Br. 5 (quoting the same passage). In the cited Eisenberg text, the researchers were not reporting the results of their empirical study. They were describing an area that they did *not* study, but which they believe merits separate inquiry. 26 J. Legal Stud. at 625. Their analysis did find that punitive damages awards in nonintentional personal injury cases are "very rare." *Id.* at 637, 645. Most importantly, the researchers' found that the amount of punitive damages awarded in a particular case is closely corelated to the amount of compensatory damages and thus highly predictable. *Id.* at 651. Settlements, they suggest, "should reflect what juries have done in prior cases." *Id.* at 625. The study thus provides no support for the proposition that routine, unpredictable punitive damage awards exert a "shadow effect" on settlements.

Moreover, this Court in *Baker* examined the available relevant empirical studies and concluded that "data have not established a clear correlation." 554 U.S. at 498 n.15.

B. There Is No Evidence that Defendants Routinely Settle Meritless Cases Out of Fear that a Jury May Award Punitive Damages.

Petitioner's failure to provide any empirical data demonstrating that fear of random large punitive awards actually causes defendants to settle meritless cases is all the more striking in the area of general maritime law. Changes in the law provide real-world conditions to test Petitioner's theory.

As this Court has observed, punitive damages have long "been available and awarded in general maritime actions." *Townsend*, 557 U.S. at 407. Indeed, even prior to enactment of the Jones Act in 1920 "maritime jurisprudence was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen." *Id.* at 412 (quoting David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Comm. 73, 115 (1997)). Yet, The Dutra Group and supporting amici, who would have direct access to information regarding the impact punitive damage claims on settlements, offer no such information to this Court.

A second area of inquiry into the existence of a "shadow effect" is the pattern of settlements following this Court's decision in *Townsend* that punitive damages are recoverable in appropriate cases of wrongful denial of maintenance and cure. Petitioner provides no indication of an impact on pretrial settlements of such claims. In fact, one supporting amicus concedes that "grave consequences have not

followed from this Court's decision." At-Sea Processors Ass'n Br. 7 n.6.

Thirdly, The Dutra Group could look to the jurisdictions that have held that punitive damages may be recovered in unseaworthiness cases. *See* Pet. Br. 32 n.9 (citing *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987); *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981);[13] and *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972)). Petitioner provides no evidence that during the time maritime defendants in those jurisdictions faced possible punitive damage awards in unseaworthiness cases, they settled weak cases for larger amounts compared to similar cases in jurisdictions which deny punitive damages.

Certainly, if the availability of punitive damages in these areas of general maritime law created an "in terrorem" effect that would warrant rejection of the punitive damages remedy, Petitioner and its supporting amici representing the maritime industry would have highlighted the evidence for this Court.

C. Empirical Studies Show There Is No Significant "Shadow Effect."

Not only has Petitioner failed to provide any evidence that punitive damages cast a "shadow effect" that distorts case settlements, existing

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[13] The Fifth Circuit reversed its position in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) (en banc).

empirical data indicates quite the opposite. For example, a study of case outcomes in Florida concluded,

> [D]espite frequent claims by tort reform proponents in Florida, and around the country, that punitive damages claims and punitive damages awards produce an *in terrorem* effect on corporate defendants, there is no systematically documented evidence that this is so. Indeed, there is evidence that such predicted effects are minimal or nonexistent.

Vidmar & Rose, 38 Harv. J. Legis. at 511.

Similarly, a review of all medical malpractice cases filed in North Carolina in 1984-87 inquired whether "juries regularly and unjustifiably award punitive damages" and whether "the mere assertion of a punitive damages claim coerces insurers into 'in terrorem' settlements." Thomas B. Metzloff, *Resolving Malpractice Disputes: Imaging the Jury's Shadow*, 54 Law & Contemp. Probs. 43, 72 (1991). "The observed results from the study suggest that neither of these assertions is valid." *Id.*

This Court itself took note of research into assertions that settlements are "driven" by the threat of punitive damages. *See Baker*, 554 U.S. at 499 n.15. One study cited by the Court determined that the research purporting to support this claim actually did "not show what, if any, impact such claims had on either the ultimate settlement or the costs of handling the case." Herbert M. Kritzer & Frances

Kahn Zemans, *The Shadow of Punitives: An Unsuccessful Effort to Bring It into View*, 1998 Wis. L. Rev. 157, 160-61. They concluded that existing evidence "does not support the notion that the threat of punitive damages casts a large shadow." *Id.* at 160.

A more recent empirical study, also relied on by this Court in *Baker*, examined more than 25,000 tort cases filed in Georgia state courts between 1994 and 1997. Thomas A. Eaton et al., *The Effects of Seeking Punitive Damages on the Processing of Tort Claims*, 34 J. Legal Stud. 343, 349 (2005). The study's findings were "inconsistent with [the] hypothesis that the threat of punitive damages will coerce more settlements. In fact, our data tend to suggest just the opposite." *Id.* at 366. In this Court's view, as well, "the data have not established" that such an impact on settlements exists. *Baker*, 554 U.S. at 499 n.15.

Two years after *Baker*, researchers analyzing Bureau of Justice Statistics case data found, consistent with prior empirical research, "little evidence of a settlement effect." Theodore Eisenberg et al., *The Decision to Award Punitive Damages: An Empirical Study*, 2 J. Legal Analysis 577, 615 (2010).

Another team of researchers led by Professor Eisenberg studied a large database of case outcomes assembled by the National Center for State Courts, taken from courts in 45 counties. They hypothesized that if the threat of large punitive damage awards actually pressured defendants into settling weak cases, defendants would be more likely to take such cases to trial in states that have imposed caps limiting defendants' exposure to large punitive damage

awards. In fact, the data revealed no difference in settlement rates in states with limits compared to states where punitive damages were not limited. Eisenberg, 87 Cornell L. Rev. at 770. The authors concluded that this result agrees with previous studies that found no support for the "hypothesis that settlements [are] shaped by punitive damages." *Id.* at 768.

Even the single empirical study cited by The Dutra Group does not support their position. *See* Pet. Br. 36 n.12 (quoting Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 Wis. L. Rev. 169, 172, 176-177 & n.25 for the proposition that "the perceived risk of large and unpredictable punitive damages awards 'plays a significant role in driving settlements.'"). Closer examination demonstrates that Professor Koenig's study does not support this proposition at all.

At the outset, it should be noted that the statement in question was based on the opinions expressed by attorneys involved in settlements, not on actual settlement outcomes. Professor Koenig also examined previous studies conducted in Florida, California, and Alabama and found that none showed that punitive damages exerted any impact on the settlement process or were used to extort higher settlement offers. Koenig, 1998 Wis. L. Rev. 178-81.

Because settlements are almost always negotiated by liability insurers, Professor Koenig viewed a closed claim study by the Texas Department of Insurance as offering valuable insight. Claims adjusters were required to assess the impact that a claim

for punitive damages had on the insurer's ultimate decision to pay the liability claim. Across small, medium and large claims for bodily injury, adjusters reported that only a percentage of claims was at all affected by the presence of a claim for punitive damages. For claims under $10,000, punitive damage claims were estimated to have increased the settlement payout by about 14 percent, while settlements over $200,000 were increased by only 4.8 percent. *Id.* at 189-94.

A closed claim study conducted by the Insurance Services Office involving liability claims of over $25,000 for bodily injury included data from 27 states. The results were similar to the Texas study. In cases where punitive damages were claimed, "the 'shadow effect' of punitive damages was reported to be 8%. Across all claims, the effect was measured at slightly more than 1% in the opinion of claims adjusters." *Id.* at 201.

In sum, nothing in Professor Koenig's work supports Petitioner's notion that a claim for punitive damages exerts any pressure on defendants to settle cases that have no merit. Settlements were reached in cases deemed to be meritorious, with only a slightly larger payout where punitive damages were sought. As summarized by Professor Koenig, "[p]unitive damages may be claimed, but adjusters dismiss their significance. The proof is in the payouts." *Id.* at 208.

Clearly, the great fear of unpredictable and unpredictably large punitive awards professed by Petitioner and supporting amici is baseless. Its purported "shadow effect" causing defendants to enter

into expensive settlements of meritless lawsuits does not exist and should not be the basis for denying the remedy of punitive damages in maritime unseaworthiness cases.

D. Petitioner's Purported "Shadow Effect" Is Grounded in a Myth that Punitive Damage Claims Are Easily and Routinely Presented to Juries.

1. Trial courts require plaintiffs to present evidence of defendants' willful and wanton misconduct to seek punitive damages.

Much of The Dutra Group's professed fear of random, undeserved punitive verdicts is rooted in the mistaken notion that plaintiffs can simply add a count for punitive damages to any personal injury complaint in hopes that the jury will favor them with a generous award irrespective of the merits. Petitioner compounds this error by conflating the strict liability unseaworthiness cause of action with the punitive damages claim. *See* Pet. Br. 35 ("Because unseaworthiness is a strict-liability regime, in which fault need not be proved, it is comparatively easy for a plaintiff to survive dispositive pretrial motions and then prevail at trial. The threat of punitive damages will therefore have an *in terrorem* effect on unseaworthiness defendants.").

Petitioner's supporting amici echo this mistaken view. *See, e.g.*, American Waterways Operators Br. 22 (A claim of unseaworthiness, which "does not require proof of knowledge or fault on the part of

the vessel owner" can be coupled with "mere assertion of a claim for punitive damages, even if meritless." In addition, vessel owners will face "a claim for punitive damages in nearly every seaman's personal injury case."); American Maritime Ass'n Br. 4 (Affirmance would "permit punitive damages where a minimal showing of unseaworthiness results in absolute liability regardless of fault."); Greater New Orleans Barge Fleeting Ass'n Br. 18 (If allowed in unseaworthiness actions, "every seaman will bring a claim against a vessel owner for punitive damages . . . regardless of whether the vessel owner acted in a wanton or reckless manner"); Inland River Harbor Br. 27 ("[C]laims seeking punitive damages for unseaworthiness will become boilerplate in seamen's complaints."); U.S. Chamber Br. at 13 (Under the decision below "substantial punitive damages can now result from the generic common-law duty to provide a seaworthy vessel.").

To the contrary, "[n]o jurisdiction permits punitive damages to be awarded for mere negligence," much less strict liability. Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 Loy. L.A. L. Rev. 1297, 1304 (2005). Punitive damages may be awarded only where the evidence shows that defendant's conduct was "outrageous," Restatement (Second) of Torts § 908 (1979), showing willful, wanton and reckless indifference to the rights of others, "or behavior even more deplorable." *Baker*, 554 U.S. at 493.

Importantly, pleading requirements "screen out marginal claims and prevent extortionate claims," prior to trial. Rustad, 38 Loy. L.A. L. Rev. at 1313-14. "In most jurisdictions, the plaintiff must

demonstrate willful, wanton, or malicious behavior, and judges appear to be exercising their statutory or common law discretion in pre-trial proceedings." Neil Vidmar & Mirya Holman, *The Frequency, Predictability, and Proportionality of Jury Awards of Punitive Damages in State Courts in 2005: A New Audit*, 43 Suffolk U. L. Rev. 855, 867 (2010). In fact, "judicial gate-keeping prevents many routine claims from ever being put to the jury in the first place, as judges apply the common law and statutes to eliminate inappropriate claims. *Id.* at 879.

A review of punitive damages awarded in products liability suits illustrates that the foundation of The Dutra Group's purported shadow effect – the ease of presenting requests for punitive damages to juries – is baseless. A product manufacturer may be strictly liable for injury caused by a defective product, regardless of fault. *See* Restatement (Second) of Torts § 402A. However, before the jury may be asked to award punitive damages, plaintiff must introduce sufficient proof that the defendant marketed its product knowingly or in conscious disregard for the purchaser's safety.

Professor Rustad, in his study of punitive damage verdicts in product liability cases, observed that "[c]ontrary to the fears of the business community, plaintiffs have a substantial burden before the issue can be submitted to the fact-finder. Michael Rustad, *In Defense of Punitive Damages of Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 65 (1992) [hereinafter "*In Defense of Punitive Damages*"]. Generally, evidence of the defendant's "knowledge of a defect and subsequent disregard is a precondition for a punitive

award." *Id.* at 73. Overwhelmingly, "the companies were punished when plaintiffs proved that companies . . . knew of a developing or known risk of danger and failed to take available safety steps to avoid the danger." *Id.* In fact, the most common predictor that the jury may award punitive damages is the introduction of "smoking gun" evidence that the company was well aware that the product was highly dangerous, but covered up the danger in an effort to maximize profits. Several examples are described in Michael L. Rustad, *How the Common Good Is Served by the Remedy of Punitive Damages*, 64 Tenn. L. Rev. 793, 818-39 (1997) [hereinafter "Rustad, *How the Common Good Is Served*"].

One well-known example is the case of the Ford's popular subcompact car marketed in the 1970s, the Pinto. Internal Ford memos revealed that, even before the first Pinto was offered for sale, the company knew that the fuel system presented a severe risk of fuel-fed fires, particularly when the car rolled over or was rear-ended. Documents show that Ford anticipated that 180 people would be burned to death and another 180 severely injured by fuel-fed fires. The hazard could have been minimized or eliminated with changes costing less than $16 per car. Ford management nevertheless determined that it was more profitable to pay compensatory damages than to make the car safer. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 774-78 & 813 (1981). *See also* Stuart Speiser, Lawsuit 355-63 (1980) (detailing the documentary evidence in the case). The court of appeal, while upholding Ford's liability for punitive damages, also upheld the trial

court's reduction of the amount from $125 million to $3.5 million. *Grimshaw*, 119 Cal. App. at 822-23.

In the maritime context, "punitive damages have long been an accepted remedy under general maritime law." *Townsend*, 557 U.S. at 424. Although vessel owners may be strictly liable for failure to pay maintenance and cure, this Court held that punitive damages "for the *willful and wanton disregard* of the maintenance and cure obligation should remain available in the appropriate case." *Id.* (emphasis added).

As in the product liability context, an injured seaman cannot ask a jury to award punitive damages unless plaintiff has demonstrated not only that the vessel was unseaworthy, but additionally that the vessel owner willfully and wantonly exposed the seaman to the danger. The argument that seamen will simply add a request for punitive damages to every unseaworthiness complaint – and that vessel owners will settle out of fear that a jury will issue an arbitrary and unsupported punitive damage award – has no basis in fact.

2. Professed fear of arbitrary and outrageous punitive damage awards is not based on fact, but on advocacy, providing no sound policy for denying the punitive damages remedy.

What might give rise to this fear of unpredictable, out-of-control punitive damages, unsupported

by empirical data or by the procedural realities of personal injury practice? Petitioner relies on Professor Koenig's inquiry into this effect for the proposition that "the *perceived* risk of large and unpredictable punitive damages awards 'plays a significant role in driving settlements.'" Pet. Br. 36 n.12 (emphasis added) (quoting Koenig, 1998 Wis. L. Rev. at 172, 176-177 & n.25). This "perceived" risk, as previously discussed has no factual support and is not "based on the observed pattern of judge and jury trial outcomes." Eisenberg, 87 Cornell L. Rev. at 768. Instead, the shadow effect "may be based on misperception." *Id.*

The context of Professor Koenig's remark is illuminating:

> My thesis is that even though the empirical research consistently shows that punitive damages are rare and well-controlled by the judiciary, this remedy plays a significant role in driving settlements. The empirical evidence suggests that the business community's fear of runaway punitive damages is exaggerated. . . . A belief that punitive damages are "out of control" and randomly assessed may create a self-fulfilling prophesy as parties negotiate claims according to their perceptions of the populist behavior of juries. Anecdote, hyperbole and simple confusion may shape settlements in a more powerful way than empirical truths.

Koenig, 1998 Wis. L. Rev. at 172.

As Professor Rustad has pointed out, the business community's exaggerated fear of punitive damages is the consequence an organized advocacy effort by advocates of tort reform, largely funded by major corporations. Rustad, *How the Common Good Is Served*, 64 Tenn. L. Rev. at 795 (1997). *See also* Vidmar & Holman, 43 Suffolk U. L. Rev. at 856. Advocates targeting the availability of punitive damages imaginatively, but wrongfully, "portray [it] as the unpredictable nine-hundred-pound gorilla of our civil justice system ever ready to wreak havoc on corporate America." Rustad, 38 Loy. L.A. L. Rev. at 1297.

To create a fear of punitive damages that demands political and judicial action, punitive damages are demonized so that businesses believe "that punitive damages come out of the blue, striking like lightning." Rustad, 64 Tenn. L. Rev. at 844. Unhappily, creating this myth has "unintended, negative consequences." *Id.* at 795. The business community persuaded to invest substantial resources in changing tort law, rather than investing in safety that would preclude tort liability. *Id.*

Certainly, the mere possibility that vessel owners might believe – and base settlement decisions on – such myth and misperception cannot serve as a sound basis for this Court's decision.

III. The Availability of Punitive Damages Provides Financial Incentive for Vessel Owners to Avoid Exposing Seamen to Known Dangerous Conditions, Resulting in Greater Safety and Benefiting the Maritime Industry.

A. The Availability of Punitive Damages Effectively and Efficiently Protects the Public From Egregious, Socially Harmful Misconduct.

1. The threat of punitive damages provides an efficient financial incentive for safety.

Punitive damages is "a well-established principle of the common law . . . [in] all actions on the case for torts," allowing juries and judges to identify certain unlawful misconduct as particularly worthy of condemnation. *Day v. Woodworth*, 54 U.S. 363, 371 (1851); *Barry v. Edmunds*, 116 U.S. 550, 562 (1886). The modern-day consensus is that the purpose of punitive damages is "retribution and deterring harmful conduct." *Baker*, 554 U.S. at 492.

The Dutra Group and its supporting amici argue that immunity from punitive damages is essential to the long-term health of the maritime industry. In fact, just the opposite is true. Judge Guido Calabresi, who was one of the earliest scholars to apply economic theory to tort law, has explained that, in some categories of cases, an award of compensatory damages, standing alone, will "result in systematic underassessment of costs, and hence in systematic underdeterrence" of misconduct. *Ciraolo v. City of*

New York, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring), *cert. denied*, 531 U.S. 993 (2000). The availability of "[p]unitive damages can ensure that a wrongdoer bears all the costs of its actions, and is thus appropriately deterred from causing harm." *Id.* The rationale for punitive damages, as the California court in the Ford Pinto case, a commercial enterprise "may find it more profitable to treat compensatory damages as a part of the cost of doing business rather than to remedy the [dangerous] defect." *Grimshaw*, 119 Cal. App. at 382. Indeed, willfully disregarding safety can give that company "an unfair advantage over its more socially responsible competitors." *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 47 (Alaska 1979). To keep pace, those competitors may feel compelled to disregard safety, leading to a "race to the bottom" in terms of preventing harm to workers, consumers, or the general public. Surely, it cannot be argued that the maritime industry cannot survive unless it ignores the safety of its seamen.

Punitive damages are an efficient means to deterring misconduct. As Professor Robertson has noted "[i]f the threat is well-designed, such damages should not have to be actually awarded very often. We want the threat to *work*." Robertson, 28 J. Mar. L. & Com. at 162-63 (emphasis original). In fact, as demonstrated by the product liability experience, punitive damages, even if rarely awarded, serve as financial incentive to deter willful disregard for safety.

2. The availability of punitive damages has resulted in enhanced product safety.

As previously noted, punitive damages are rarely awarded in product liability cases; 355 such awards could be found between 1965 and 1990. Rustad, 78 Iowa L. Rev. at 30. Professor Rustad's follow-up research on those awards determined that:

> Punitive damages played a vital social policy role in discouraging firms from marketing dangerous products or failing to recall them. The vast majority of dangerous products have been recalled, modified, and redesigned by their manufacturers. Of the cases studied, as many as eighty-two percent of the defendants took some safety step to remedy the dangerous situation.

Id. at 79.

One clear example can be seen in the actions of Ford after the Pinto issue. In light of the case, Ford "underwent a complete management change." Rustad, 64 Tenn. L. Rev. at 843. In 1980, Ford's new president "implemented directives about designing safety features," and two years later "implemented significant improvements in fuel system integrity." *Id.* at 844.

3. The availability of punitive damages has reduced wrongful denial of maintenance and cure.

Also instructive are developments following this Court's decision in *Townsend*, recognizing the availability of punitive damages in appropriate cases of wrongful denial of maintenance and cure. Like unseaworthiness, violation of the obligation to provide maintenance and cure is a strict liability cause of action. However, as one practitioner noted,

> [S]ome employers willfully withhold these payments as a method to force settlements at an early stage. Crewmembers generally have few resources to sustain themselves adequately after an injury, or to pay for proper medical attention and therapy. Unless the courts place a significant price on the actions of these employers, the crewmembers will continue to be victimized.

Paul S. Edelman, *Guevara v. Maritime Overseas Corp.: Opposing the Decision*, 20 Tul. Mar. L.J. 349, 357 (1996).

For fourteen years prior to this Court's *Townsend* decision, seamen in both the Fifth and the Ninth Circuits could not recover punitive damages for willful or wanton denial of maintenance and cure. *See Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995); *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995). Some employers during that time willfully denied proper claims by seamen. *See, e.g., Weeks Marine, Inc. v.*

Bowman, 2006 WL 2178514, at * 2 (E.D. La. May 23, 2006) (deploring defendant's "consistently unreasonable and recalcitrant conduct" in refusing to pay for its seaman's surgery); *Moore v. The Sally J.*, 27 F. Supp. 2d 1255, 1261 (W.D. Wash. 1998) (defendant's refusal was "willful and persistent"); *Charpentier v. Blue Streak Offshore, Inc.*, 1997 WL 426093, at *5-6, 9 (E.D. La. July 29, 1997) (detailing defendant's "callous" mistreatment of seaman); *Spell v. American Oilfield Divers, Inc.*, 722 So.2d 399, 405 (La. Ct. App. 1998) (defendant's handling of the maintenance and cure claim was "recalcitrant" and "egregious").

A further example is *Clausen v. Icicle Seafoods, Inc.*, 272 P.3d 827 (Wash. 2012), *cert. denied*, 568 U.S. 823 (2012). Seaman Clausen was injured in 2006. The vessel owner persistently delayed or denied payment for medical treatment, intentionally disregarding Clausen's health, and paid only $20 per day in maintenance, knowing Clausen was "practically homeless." *Clausen*, 272 P.3d at 835. Defendant's purpose was to pressure Clausen "to take the 'bait' and settle early without legal representation." *Id.* In addition, the company "deliberately made false statements" to the federal court in an effort to terminate maintenance and cure. *Id.* at 835-36. The Washington Supreme Court concluded that punitive damages were warranted to deter owners from such "reprehensible" and "egregious" unlawful conduct. *Id.* at 836.

Following *Townsend*, however, attorneys representing seamen observed that "employers are paying maintenance and cure, sometimes 'under protest' and often begrudgingly, but the tide has turned to helping injured seamen at least get by with

maintenance and cure." Neil F. Nazareth and Ian F. Taylor, *Post-Townsend Awards for Failure to Pay Maintenance and Cure: An Overview*, paper delivered at AAJ's 2017 Annual Convention, *available on Westlaw.com at* "2017 Annual AAJ-PAPERS 42."

As one scholar has observed, "The question is not, do punitive damages have a deterrent effect? The answer to that question is that of course they almost certainly do." Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 Iowa L. Rev. 957, 983 (2007).

B. Punitive Damage Awards Do Not Result in Overdeterrence of Socially Beneficial Conduct.

The Dutra Group does not dispute that punitive damages deter misconduct. Rather, Petitioner claims that the mere possibility of punitive awards will *overdeter*, causing corporate defendants to "take socially wasteful precautions or decline to engage in socially valuable commercial activity altogether." Pet. Br. 34 (citing A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 882-883 & n.29 (1998)). This is a surprising assertion – akin to claiming that instituting a fine for reckless driving will cause people and companies to discontinue driving altogether. Petitioner offers not a single example in support. Professors Polinsky and Shavell, in the passage cited by Petitioner and the authorities in the cited footnote, focus entirely on product liability damages in mass tort cases involving pharmaceuticals and vaccines. Those authors do not contend that punitive damages themselves have discouraged worthwhile activity.

More fundamentally, Professors Polinsky and Shavell contend that punitive damages *should* be available, but that the amount awarded should reflect the likelihood that the defendant might escape compensatory liability. Polinsky & Shavell, 111 Harv. L. Rev. at 954. They contend that "the reprehensibility of a party's conduct generally should not be a factor in the assessment of punitive damages." *Id.* This Court, however, has firmly stated that the reprehensibility of the defendant's misconduct is perhaps "the most important indicium of the reasonableness of a punitive damages award." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). It is "particularly reprehensible" conduct that punitive damages deter. *Id.* at 576. There can be no overdeterrence of an egregiously reprehensible act. *See* Keith N. Hylton, *Reflections on Remedies and* Philip Morris v. Williams, 27 Rev. Litig. 9, 20 (2007) (where "the offender's conduct offers no social benefit whatsoever, there is no cost associated with over-deterrence.").

The Ninth Circuit did not hold that an owner who puts its vessel out to sea with an unknown unseaworthy condition aboard will face an award of punitive damages. Rather, the vessel owner may be punished for willfully or wantonly exposing the injured seaman to a known danger. This is a standard that a vessel owner can comply with, benefitting the seamen who work aboard the vessel and giving the owner an economic advantage over another who would pursue short term gain instead. The maritime industry can prosper under such a regime.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

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February 28, 2019

No. 18-266

IN THE

Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN MARITIME ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The American Maritime Association, Inc. ("AMA") is a non-profit employer trade association whose members own and/or operate U.S.flag vessels in coastwise and ocean-going trade. AMA's members are **Alaska Tanker Company, LLC ("Alaska"); Crowley Maritime Corporation ("Crowley"); Horizon Lines, LLC ("Horizon"); Maersk Line, Limited ("Maersk"); OSG Ship Management, Inc. ("OSG"); and TOTE Services ("TOTE")** (formerly Interocean American Shipping Corp.)

AMA member companies collectively account for the majority of oceangoing vessels now operating under the U.S.flag and are subject to the *Jones Act* and general maritime law. As such, they have a critical interest in whether seamen and others asserting unseaworthiness claims against vessel operators and owners may assert claims for punitive damages.

BACKGROUND

The U.S. merchant marine plays a critical role in supporting the U.S. economy and its national security,

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1. Both Petitioner and Respondent have filed blanket consents to the filing of amicus curiae briefs in this matter.

In accordance with Rule 37.6, counsel certifies that the undersigned authored this brief in its entirety and that no counsel for any party authored any portion of this brief; that no party or party's counsel contributed money to fund the preparation or submission of this brief; and that no party other than the Amicus Curiae contributed money intended to fund the preparation or submission of this brief.

as well as providing humanitarian relief in times of disaster. According to a study by PricewaterhouseCoopers prepared for the Transportation Institute, the domestic maritime industry provides almost 500,000 jobs and some $100 billion in annual economic output.[2] When trade dependent jobs are included, the maritime industry related employment is estimated to be approximately 13 million jobs.[3] It is anticipated that ocean trade will continue to grow, with the value of U.S. imports and exports reaching some $10.5 trillion in 2038.[4]

The AMA member companies together operate more than 150 vessels in both U.S. coastal and international waters. As discussed in more detail below, many of these vessels are under contract with the U.S. government, providing military support for operations overseas, ready to be called into duty on a moment's notice. This fleet transports military vehicles, hardware, combat cargo and supplies to support U.S. troops wherever needed.

SUMMARY OF ARGUMENT

AMA adopts but does not here repeat in detail arguments thoroughly and ably made by counsel for

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2. TRANSPORTATION INSTITUTE, https://www.transportationinstitute.org (last visited January 28, 2019); *America's Maritime Industry: The foundation of American seapower*, NAVY LEAGUE OF THE UNITED STATES, (May 3, 2012), *available at* https://www.navyleague.org/file/programs/Maritime-Policy-Statement-Report.pdf (last visited January 28, 2019).

3. *America's Maritime Industry: The foundation of American seapower*, *supra* note 2.

4. *Id.*

Petitioner and other amici. The issue before the Court, however, whether punitive damages should be available in a claim for unseaworthiness under general maritime law, has critical implications for the U.S. maritime industry and the national security of the United States. AMA brings before the Court the practical implications of this issue on the industry, on its members, and on national security.

The bar for establishing that a vessel is "unseaworthy" is passingly small, lacking any requirement to prove fault. The effect of permitting punitive damages in such actions, including cases where a plaintiff's own negligence caused or contributed to the unseaworthy condition, would inevitably force employers to settle even non-meritorious claims and could compromise the economic vitality of an industry critical to the transportation of goods; which supports and supplies the nation's military; which is vital to the balance of trade; and which provides much needed emergency and humanitarian relief when supplies must be moved in large quantities to areas devastated by natural disasters.

The case before the Court presents a choice between expanding the range of remedies available to individual mariners and overarching public policy interests. That balance tips decidedly against the availability of punitive damages in these cases.

ARGUMENT

I. The Balance of Competing Interests Militates against the Availability of Punitive Damages

a. "Unseaworthiness" Requires A Modest Showing But Imposes Strict Liability

As repeatedly noted in the Courts below and by the parties, punitive damages are not available under the *Jones Act*. *See* 46 U.S.C.A. § 30104 (West); *see also McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 384 (5th Cir. 2014) (precluding punitive damages). Mariners asserting claims under the *Jones Act* must show negligence. *See, e.g., Rannals v. Diamond Jo Casino*, 265 F.3d 442, 447 (6th Cir. 2001) (*citing* 46 U.S.C.A. § 30104). By contrast, common law unseaworthiness actions require no showing of negligence or fault. *See Rofail v. United States*, No. 04-CV-2502 (CBA), 2009 WL 1703236, at *7 (E.D.N.Y. June 18, 2009) ("The Supreme Court has explained that 'unseaworthiness is a condition, and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it.'") (*quoting Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 498 (1971)). It would be a paradox to prohibit punitive damages where there is an actual showing of fault but to permit punitive damages where a minimal showing of unseaworthiness results in absolute liability regardless of fault.

"Unseaworthiness" requires a showing that the vessel is unfit for its intended use. *Faraola v. O'Neill*, 576 F.2d 1364, 1366 (9th Cir. 1978) (*quoting Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960)). This standard is

almost comically easy to meet, and has been established where a drunk mariner returned to his vessel, passed out in the ship's recreation room, and burned himself on a radiator.[5] Supplying beer to a crew "without adequate control" constitutes unseaworthiness.[6] "The failure to instruct about the use of life preservers and the failure to provide a working bathroom resulted in unseaworthiness as a matter of law."[7] A seaman could bring an unseaworthy claim for a back injury allegedly sustained after tripping on a loose plastic sleeve on a carton of soft drinks in the ship's stores.[8] While an injury caused by a mariner with violent proclivities certainly establishes unseaworthiness,[9] so does employment of an officer with no history of violence who injures another crew member.[10] One court has held that the lack of adequate supplies to clean a stove constituted an unseaworthy condition.[11]

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5. *Bentley v. Albatross S. S. Co.*, 203 F.2d 270–71 (3d Cir. 1953).

6. *Reyes v. Vantage S. S. Co.*, 558 F.2d 238, 244–45 (5th Cir. 1977), *on reh'g*, 609 F.2d 140 (5th Cir. 1980).

7. *Deal v. A. P. Bell Fish Co.*, 674 F.2d 438, 442 (5th Cir. 1982).

8. *Martinez v. Sea Land Servs., Inc.*, 763 F.2d 26, 28 (1st Cir. 1985).

9. *Boudoin v. Lykes Bros. S. S. Co.*, 348 U.S. 336, 339–40 *amended sub nom. Boudoin v. Lykes Bros. Steamship Co.*, 350 U.S. 811 (1955); *Wiradihardja v. Bermuda Star Line, Inc.*, 802 F. Supp. 989, 994 (S.D.N.Y. 1992) *citing Claborn v. Star Fish & Oyster Co., Inc.*, 578 F.2d 983, 985–87 (5th Cir.1978).

10. *Casbon v. Waterman S. S. Corp.*, 274 F. Supp. 481, 484 (E.D. La. 1967), *aff'd*, 417 F.2d 1040 (5th Cir. 1969).

11. *Moore v. The Sally J.*, 27 F. Supp. 2d 1255, 1261 (W.D. Wash.

Once unseaworthiness is established and regardless of fault, owners are subject to strict liability even if a crew member's own negligence or misconduct created the condition at issue. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 25 (1990); *see also Mahnich v. S. S. S. Co.*, 321 U.S. 96, 100 (1944). Once a mariner meets the exceedingly low bar of unseaworthiness, liability is absolute. *Id.*

The bar is set exceedingly low because mariners are considered wards of the court and there is a well-deserved effort to protect them.[12] That does not mean, however, that the interests of an individual mariner outweigh those of a critical industry. This is not an industry that can sustain the financial assault that would be imposed if punitive damages were available to individual mariners. AMA's

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1998). As one court has observed, ". . .unseaworthiness can arise not only from something as nautical as a faulty anchor windlass but from something as unmaritime as the presence on a ship of a hazardous chemical." *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 12 (1st Cir. 1983); *see also Smith v. Ithaco Corp.*, 612 F.2d 215 (5th Cir.1980), *abrogated on other ground by Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988) (unseaworthiness claim based on seaman's exposure to benzene fumes escaping from the ship's storage tanks); *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457 (5th Cir.1976) (unseaworthiness claim based on exposure to noxious fumes escaping from the chemical tank of a barge).

12. "Seamen are the wards of admiralty, and the policy of the maritime law has ever been to see that they are accorded proper protection by the vessels on which they serve..... [Thus] the owners owe[ ] to the seamen the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition; and ... for failure to discharge such duty there [is] liability on the part of the vessel and her owners to a seaman suffering injury as a result thereof." *Austin*, 705 F.2d at 12 (*quoting The State of Maryland*, 85 F.2d 944, 945–46 (4th Cir. 1936)).

members compete with foreign owned and crewed vessels that do not provide the same wages and benefits to their employees or meet the same safety and environmental standards. If punitive damages are available in these fish-in-a-barrel cases, even if available only in response to egregious conduct, just the threat of such damages will force higher settlements from companies unwilling to risk an adverse verdict. Moreover, plaintiffs will hardly be left with an inadequate remedy if punitive damages are unavailable; they will still have access to the full panoply of pecuniary damages. Injecting punitive damages into the litigation calculus skews that balance too heavily toward plaintiffs who already enjoy adequate protection and receive full compensation.

b. Maritime Companies Are Crucial to The National Interest And Must Be Protected from Excessive Penalties

The nation has a vital interest in the economic well-being of the maritime industry. AMA's members are not "merely" commercial operations that add to the economy; they are critical to it and to national security. The U.S. merchant marine fleet, "is necessary for the national defense. . .that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency." *Merchant Marine Act of 1936*, 46 U.S.C. App. § 861.

Most AMA companies perform services directly for the United States government through several programs:

- Maritime Administration ("MARAD") serves as strategic reserve sealift capacity. In times of national crisis, these ships are among the first to be called to action to carry cargo, be it for disaster relief or national defense.[13]

- Maritime Security Program ("MSP") is a group of more than 60 vessels that receive subsidies from the United States Government in return for being first available to carry cargo in times of a threat to national security. These vessels carried the vast majority of goods during Operation Desert Storm and other similar conflicts in the Middle East.[14]

- T-AGOS ships operate in contested environments, helping gather intelligence for the Air Force and Navy.[15]

- The Military Prepositioning Force is a fleet of government-owned ships pre-positioned in strategic areas with military equipment and operated by AMA members.[16]

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13. MARAD Maritime Administration, https://www.maritime.dot.gov/ (last visited January 28, 2019).

14. *Maritime Security Program ("MSP")*, MARAD Maritime Administration, https://origin-www.marad.dot.gov/ships-and-shipping/strategic-sealift/maritime-security-program-msp/ (last visited January 28, 2019).

15. *Oceans Surveillance Ships – T-AGOS*, Navy, https://www.navy.mil/navydata/fact_display.asp?cid=4500&tid=600&ct=4 (last visited January 28, 2019).

16. Military Sealift Command, https://www.msc.navy.mil (last visited January 28, 2019).

All of these programs could be compromised from the residual fallout if punitive damages are available. More specifically, **OSG**, which owns and/or operates a 22-vessel U.S.-flag fleet, operates the only two tankers in the U.S. Maritime Security Program. **Maersk** operates tankers chartered to the U.S. government and manages vessels for MSC and other U.S. government agencies. **Crowley**, a third-generation family-owned company, operates a fleet of 107 U.S.-flagged vessels covering all of the United States from Florida to Alaska and in international trade. **Crowley** operates more than 20 vessels owned by the U.S. Government, both for MARAD and MSC, performing critical sealift and national security functions, and was instrumental in the destruction of chemical weapons in Syria. **TOTE** has numerous government contracts. It acts as the ship operator to MSC's USNS VADM KR WHEELER, an offshore petroleum distribution system that can transfer fuel from a tanker to depots ashore from up to eight miles off the coast. Similarly, it manages the SS Petersburg, a tanker owned by MARAD that pumps fuel from a position four miles offshore, which is of obvious utility in times of war. **TOTE** managed the technical conversion of two government owned tracking and telemetry ships in service to the Missile Defense Agency. It also provides ship management for six MARAD vessels that are part of the MARAD Ready Reserve Force. **TOTE** is responsible for the maintenance, surveillance and monitoring of a nuclear ship in decommissioning protective storage.

Not only is the availability of these ships critical to national security, but perhaps even more critical is the training and knowledge of a crew of U.S. citizens to operate these tankers immediately in a time of crisis.

Loyalty to the U.S., the knowledge of AMA crews as to navigating foreign ports, and their relationships with those operating foreign ports and terminals provide necessary elements and support for our national security. Forcing these companies to pay (or to be threatened with) punitive damages could cripple the industry and, by extension, the national defense.

AMA members' ships also are critical to emergency relief. After Hurricane Maria devastated Puerto Rico in September 2016, **Crowley** was able to reopen its local terminal and warehouse within two days. **Crowley** was delivering commercial and government relief within two hours after San Juan harbor opened. In the ensuing months, **Crowley** transported goods for FEMA, U.S. AID and others, and increased its capacity to Puerto Rico by 67 percent, transporting more than 100,000 TEUs[17] of relief and recovery supplies, including 40,000 electrical poles and more than 7,000 transformers for the electrical grid. In one 182-day stretch, **Crowley** unloaded 200 vessels.[18] Similarly, **TOTE** responded to hurricane relief situations by operating additional vessels with only a few days' notice, providing housing for FEMA workers responding to hurricane aid. Like **Crowley**, **TOTE** companies

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17. A "TEU", or a Twenty Foot Equivalent Unit is the volume of goods that can be placed in a twenty-foot shipping container. FLEXPORT, https://www.flexport.com/glossary/twenty-foot-equivalent-unit (last visited January 28, 2019).

18. *Crowley receives humanitarian award for Puerto Rico relief efforts*, MARINE LOG, https://www.marinelog.com/index.php?option=com_k2&view=item&id=29548:crowley-receives-humanitarian-award-for-puerto-rico-relief-efforts&Itemid=231 (last visited January 28, 2019).

responded during Hurricane Maria to bring supplies to Puerto Rico by contracting additional support barges to provide relief to those in need facing the devastation left by the Hurricane.

AMA members operate with enviable success. In almost 17 years, **Alaska** has carried **1.4 *billion*** barrels of crude and has spilled less than 2.2 gallons. In recent years **Crowley** has invested billions of dollars in the *Jones Act* trade, including two new state of the art, environmentally friendly ships fueled by liquid natural gas. **Horizon's** four *Jones Act* vessels often are the sole lifeline to island economies and remote locations in Alaska. Without those ships, those communities would be at risk.

Thus, AMA members, who perform these vital roles, are faced with an untenable economic threat, one that is largely uninsurable. Again, the competing interest here is that of individual mariners who already have access to a full remedy. The balance seems clear.

CONCLUSION

The U.S.-flag fleet is critical to national defense, to emergency preparedness, to the balance of trade, and to emergency and humanitarian relief. Mariners injured because a vessel meets the slight standard of unseaworthiness have a full range of pecuniary recovery available to them in such actions and under the *Jones Act*. Adding the threat of punitive damages will injure an industry critical to the nation's well-being for the benefit of individual mariners with access to other relief. Such an expansion of remedies is unnecessary and potentially devastating to an industry upon which the United States so heavily relies.

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No. 18-266

In the Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE THE AMERICAN WATERWAYS OPERATORS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether punitive damages may be awarded to a Jones Act seaman in a personal injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.

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Rules

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae The American Waterways Operators (AWO) files this brief in support of Petitioner The Dutra Group and urges this Court to reverse the decision below of the Ninth Circuit Court of Appeals.[1]

AWO is the national trade association for the nation's inland and coastal tugboat, towboat, and barge industry. The industry employs over 35,000 mariners and supports a total of over 300,000 jobs.[2] Industry members own and operate nearly 5,500 tugboats and towboats and more than 31,000 barges throughout the country.[3] AWO represents the largest segment of the U.S. flag domestic fleet of Jones Act vessels and mariners. The industry carries more than 760 million tons of domestic cargo worth nearly $300 billion annually.[4] It is a vital segment of America's interstate and coastal transportation system, providing reliable and cost-effective maritime transport in a safe, environmentally sound manner.

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[1] Pursuant to Supreme Court Rule 37.6, AWO certifies that no counsel for any party participated in the drafting of this brief, and no person besides amicus curiae made any monetary contribution intended to fund the preparation or submission of this brief. Both parties have filed blanket consents to the filing of amicus curiae briefs in support of either or neither party.

[2] PRICEWATERHOUSECOOPERS LLP, ECONOMIC CONTRIBUTION OF THE US TUGBOAT, TOWBOAT, AND BARGE INDUSTRY ES-2, 5 (2017), https://tinyurl.com/ybda3llm.

[3] *Id.* at ES-1.

[4] *Id.* at ES-1, 14.

AWO's members have much at stake in this case. If the Ninth Circuit opinion stands, it will seriously impact the economic viability of the industry. AWO's members rely upon the predictability and uniformity of federal maritime law and the boundaries of federal maritime legislation to assess and protect against the risks inherent in maritime commerce. The unpredictability presented by the mere assertion of a claim for punitive damages in a strict liability context, even if meritless, causes a level of uncertainty and risk that will significantly affect the financial stability of vessel owners and operators industry-wide. The general inability of vessel owners to insure against claims for punitive damages, and the significant cost of defending against them, mean that the owner of a tug and barge company who is blameless now faces the risk of a punitive damages claim which could be sufficient to sink his or her business. This risk in turn decreases the ability of the tugboat, towboat, and barge industry to provide the safe, efficient, and environmentally responsible waterborne transportation on which the country relies.

SUMMARY OF ARGUMENT

Miles v. Apex Marine Corp.[5] requires reversal of the Ninth Circuit's holding that punitive damages are available in unseaworthiness actions.[6] In *Miles*, this Court held that the Jones Act defines—and delimits—the tort remedies for a seaman's claim for injury or death based on unseaworthiness. The Jones

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[5] 498 U.S. 19 (1990).

[6] *Batterton v. Dutra Grp.*, 880 F.3d 1089, 1096 (9th Cir. 2018).

Act, with its wholesale incorporation of the tort liability scheme embodied in the Federal Employers' Liability Act ("FELA"),[7] permits only the recovery of compensation for "pecuniary loss" and hence does not permit the recovery of punitive damages. Under *Miles*, this limitation applies to claims for unseaworthiness. The Fifth Circuit, sitting *en banc*, agreed with this conclusion.[8]

The Ninth Circuit held otherwise, reasoning that *Atlantic Sounding Co. v. Townsend*,[9] not *Miles*, controls. *Townsend* holds that the Jones Act does not preclude the recovery of punitive damages for the willful and wanton refusal of a maritime employer to pay benefits known as maintenance and cure to an ill or injured seaman. This Court reasoned that the Jones Act does not address maintenance and cure benefits or the remedies for withholding them. In contrast, *Miles* recognizes that the Jones Act **did** intend to address and modify an employer's tort liability for a seaman's injury or death.

The Ninth Circuit overlooked that important difference. Unlike unseaworthiness, a seaman's claim for wrongful withholding of maintenance and cure benefits is not an alternative to the right to compensatory tort damages under the Jones Act. It is an independent cause of action that has been likened to a contractual right rather than tort liability. *Townsend*

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[7] 45 U.S.C. §§ 51-60.

[8] *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382 (5th Cir. 2014), *cert. denied* 135 S. Ct. 2310 (2015).

[9] 557 U.S. 404 (2009).

only addressed punitive damages in maintenance and cure actions. *Miles* remains the controlling authority in this case.

Most important, the Ninth Circuit failed to heed this Court's warning that courts in seamen's actions for personal injury or death now "sail in occupied waters" controlled by federal statutory law.[10] When it enacted the Jones Act, Congress occupied the field as it sought to ensure a strong merchant marine through a uniform and comprehensive system of tort liability for injuries to seamen.[11] *Miles* is but the latest in a long line of decisions by this Court establishing that the Jones Act dictates and circumscribes the remedies available in a seaman's claim for damages due to injury or death based on unseaworthiness as well as negligence.

Accordingly, this Court should reverse the Ninth Circuit. To affirm the court of appeals would threaten the sustainability of the U.S. maritime industry, exactly the opposite result that Congress intended when it enacted the Jones Act with the stated purpose to foster a strong U.S. merchant marine fleet "necessary for the national defense and for the proper growth of its foreign and domestic commerce."[12]

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[10] *Miles*, 498 U.S. at 36.

[11] *Lindgren v. United States*, 281 U.S. 38, 46-47 (1930).

[12] Merchant Marine Act of 1920, ch. 250, § 1, 41 Stat. 988, 988, currently codified as amended at 46 U.S.C. § 50501.

ARGUMENT

I. *Miles* Holds That the Jones Act Defines and Delimits the Available Remedies for Unseaworthiness

Miles presented a wrongful death claim seeking compensation for, among other things, loss of society and lost future income of a seaman murdered by a fellow shipmate.[13] Accordingly, *Miles* specifically addressed whether damages for these items were recoverable in a claim for unseaworthiness and held they were not.[14] The premise of the Court's analysis was its recognition that the Jones Act "establishes a uniform system of seamen's tort law."[15]

A. *Miles* Establishes "Fundamental Principles" that Define the Judiciary's Relationship to Congress in Specifying a Seaman's Remedies for Personal Injury or Death

Before turning to the issues before it, the *Miles* Court took pains to set forth "the fundamental principles that guide our decision in this case."[16] Prominent among these was the need for courts to recognize that "[w]e no longer live in an era when seamen and their loved ones must look primarily to the

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[13] *Miles*, 498 U.S. at 21-22.

[14] *Id.* at 22-23.

[15] *Id.* at 29.

[16] *Id.* at 27.

courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas."[17]

Therefore, "an admiralty court should look primarily to these legislative enactments for policy guidance," which "both direct and delimit" judicial action.[18] Courts "may supplement these statutory remedies" to achieve uniformity in vindicating statutory policies, "but we must also keep strictly within the limits imposed by Congress" due to Congress's "superior authority in these matters."[19]

B. *Miles* Holds that the Jones Act Limits the Claimant's Unseaworthiness Recovery to Compensation for "Pecuniary Loss"

In *Miles*, the Court applied these fundamental principles, looking to the substantive legislative enactments to decide the questions before it. The Court recognized that Congress, by incorporating FELA "unaltered" into the Jones Act, "must have intended to incorporate [FELA's] pecuniary limitation on damages."[20] Accordingly, the Court confirmed that the Jones Act "limits recovery to pecuniary loss."[21]

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 32.

[21] *Id.*

The Court then observed that "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases . . . resulting from negligence."[22]

From this reasoning, the Court concluded that the Jones Act's limitation of damages to compensation for "pecuniary loss" applies to unseaworthiness claims as well and, therefore, that there could be no recovery for loss of society in an unseaworthiness action.[23] This holding, the Court explained, would "restore a uniform rule applicable to all actions for the wrongful death of a seaman," whether under the Jones Act or other statute, "or under general maritime law," referring to unseaworthiness.[24]

The Court next determined that damages for a deceased's seaman's lost future income were unavailable as well because FELA's survival provision, which the Jones Act incorporates, limits recovery to losses suffered during the decedent's lifetime.[25] While "general principles of maritime tort law"[26] might favor

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[22] *Id.* at 32-33.

[23] *Id.*

[24] *Id.* at 33.

[25] *Id.* at 35.

[26] *Id.*

this relief, this was "insufficient,"[27] because "[w]e sail in occupied waters," in which "[m]aritime tort law is now dominated by federal statute."[28] In a case involving the death of a seaman, therefore, courts "must look to the Jones Act" which "has limited the survival right for seamen's injuries resulting from negligence," and thereby "forecloses more expansive remedies in a general maritime action founded on strict liability," referring again to unseaworthiness.[29]

Thus, this Court decided *Miles* based on fundamental principles of broad application, which unambiguously apply to unseaworthiness actions. The Jones Act's limitation of a seaman's recovery to compensation for "pecuniary loss,"[30] like other limits on recovery mandated by Congress, is a limit courts "cannot exceed"[31] in an unseaworthiness case. This limitation precludes the award of punitive damages.

C. Limiting Recovery to Compensation for Pecuniary Loss Respects the Jones Act's Comprehensive Tort Liability System for Seamen's Injuries or Death

The fundamental insight of *Miles*—that the Jones Act defines the remedies for unseaworthiness—is

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[27] *Id.* at 36.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 32.

[31] *Id.* at 36.

supported by the Court's recognition that the Jones Act "overruled" *The Osceola*,[32] this Court's first mention of unseaworthiness as a basis for the vessel owner's liability for injuries to members of the vessel's crew.[33] After acknowledging that "statutes of the United States contain no provision upon the subject," *The Osceola* held that a vessel owner was not liable for injuries to a seaman resulting from the negligence of the crew.[34] But the Court noted in dicta that the owner was "liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."[35] This Court's limitation of the owner's obligation to an "indemnity" suggests that the Court had in mind simply an obligation to provide compensation, to make good any loss or damage suffered.[36]

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[32] 189 U.S. 158 (1903).

[33] *Miles*, 498 U.S. at 29.

[34] *The Osceola*, 189 U.S. at 172.

[35] *Id.* at 175.

[36] *Indemnity*, BLACK'S LAW DICTIONARY (10th ed. 2014). Before *The Osceola*, maritime law was concerned with unseaworthiness only in two unrelated situations. First, mariners suing for unpaid wages were required to prove their vessel's unseaworthiness to excuse desertion or misconduct that otherwise would forfeit their right to wages. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 544 (1960). Second, ancient cargo doctrines allowed cargo owners to recover for cargo damage if the shipowner failed to provide a ship fit to sail and safely carry the cargo. *Id.*; *see also* George H. Chamlee, *The Absolute Warranty of Seaworthiness: A History and Comparative Study*, 24 MERCER L. REV. 519, 521-23 (1973).

Section 33 of the Jones Act effectively overruled *The Osceola*, affirmatively allowing an injured seaman "to bring a civil action at law, with the right of trial by jury, against the employer."[37] It provides that in that civil action the "Laws of the United States regulating recovery for personal injury to . . . a railway employee apply,"[38] thereby incorporating FELA.[39] FELA imposes liability on a railroad common carrier for an employee's injury or death due to "negligence of any of the officers, agents, or employees of such carrier," and for "any defect or insufficiency, due to its negligence, in its cars, engines . . . boats, wharves, or other equipment."[40]

Although the Jones Act did not do away with unseaworthiness as a concept, it rendered unseaworthiness as a theory of liability nearly superfluous, "an obscure and relatively little used remedy."[41] The Act, this Court noted, "obliterated all distinctions between the kinds of negligence for which the shipowner is liable."[42] As this Court stated in 1928:

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[37] Merchant Marine Act of 1920, ch. 250, § 33, 41 Stat. 988, 1007, currently codified at 46 U.S.C. §§ 30104-30105.

[38] *Id.*

[39] *E.g.*, *Miles*, 498 U.S. at 23-24.

[40] 45 U.S.C. §§ 51-52.

[41] *Miles*, 498 U.S. at 25 (quoting GRANT GILMORE & CHARLES BLACK JR., THE LAW OF ADMIRALTY 383, 375 (2d ed. 1975) (internal quotation marks omitted)).

[42] *Mitchell*, 362 U.S. at 546-47.

> whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong for which he is entitled to but one indemnity by way of compensatory damages.[43]

Two years later, this Court proclaimed the Jones Act "a rule of general application in reference to the liability of the owners of vessels for injuries to seamen," one that "covers the entire field of liability for injuries to seamen."[44] Therefore, the Act "is as comprehensive of those instances in which . . . it excludes liability, as of those in which liability is imposed."[45]

Starting in the 1940s, this Court transformed unseaworthiness into "a species of liability without fault" that encompassed a seaman's claims for injury or death arising from the condition of the ship, its crew, and the equipment aboard the vessel.[46] The Court traced the "humble origin" of modern strict liability

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[43] *Pac. S.S. Co. v. Peterson*, 278 U.S. 130, 138 (1928) (citations omitted).

[44] *Lindgren*, 281 U.S. at 47.

[45] *Id.*

[46] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 (1946); *see also Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 100 (1944).

unseaworthiness to "dictum in an obscure case in 1922," two years after the Jones Act's passage.[47]

It was this development of modern strict liability unseaworthiness that gave rise to this Court's observation in *Miles* that "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases . . . resulting from negligence."[48] Jones Act negligence and unseaworthiness claims are widely recognized as "inseparable and indivisible parts of a single cause of action."[49] To allow the recovery of different damages for negligence and unseaworthiness for a "single legal wrong"[50] would destroy the uniformity of the Jones Act's comprehensive tort liability system for seamen's personal injury and wrongful death claims.

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[47] *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 496-97 & n.4 (1971). This dictum appeared in *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255 (1922). There the Court observed that due to improper gasoline storage the trial court "might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock if the can marked 'coal oil' contained gasoline; . . . and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages." *Id.* at 259.

[48] 498 U.S. at 32-33.

[49] Kenneth G. Engerrand & Scott R. Brann, *Troubled Waters for Seamen's Wrongful Death Actions*, 12 J. MAR. L. & COM. 327 (1981).

[50] *Pac. S.S. Co.*, 278 U.S. at 138.

II. *Townsend* Holds that the Jones Act Does Not Address Willful Refusal to Pay Maintenance and Cure or Its Remedy

Nearly two decades after *Miles*, this Court decided *Townsend*. The dispositive question in *Townsend* did not concern tort liability for a seaman's injury or death, but the maintenance and cure benefits owed to a seaman who becomes sick or injured in the course of his or her employment.[51]

Maintenance and cure, rather like workers compensation payments for shoreside workers, requires an employer to provide a sick or injured seaman with health care and compensation for living expenses,[52] and "does not rest upon negligence or culpability on the part of the owner or master."[53] This Court has described maintenance and cure as a contractual right "in the sense that it has its source in a relation which is contractual in origin."[54]

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[51] 557 U.S. at 407.

[52] *E.g.*, *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962) ("[m]aintenance and cure is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service").

[53] *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938).

[54] *Vaughan*, 369 U.S. at 532-33 (citation omitted) (internal quotation marks omitted).

If the employer wrongfully fails to provide maintenance and cure benefits, a seaman may have a separate cause of action against the employer.[55] But this cause of action is not a tort remedy for damages resulting from the injury-causing incident, and is not an alternative to any claims the seaman might have for negligence and unseaworthiness.[56]

Townsend does not reject *Miles*, and instead affirms that *Miles* "remains sound."[57] *Townsend* distinguishes maintenance and cure from the judicially created cause of action at issue in *Miles*, unseaworthiness, because "the Jones Act does not address maintenance and cure or its remedy."[58] This makes it possible "to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act."[59]

Congressional silence regarding maintenance and cure is perhaps understandable, since the deliberate withholding of maintenance and cure payments presents a different situation from that which gives rise to Jones Act and unseaworthiness liability. A claim for failure to pay maintenance and cure does not arise from the condition of the vessel or actions causally related to the injury itself: for example, grease on the

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[55] *Taylor*, 303 U.S. at 528.

[56] *Townsend*, 557 U.S. at 420.

[57] *Id.*

[58] *Id.*

[59] *Id.*

deck, a malfunctioning hatch cover, or an operational error made while facing the perils of the sea. Rather, a decision to withhold maintenance payments or approval of medical treatment is deliberate and generally occurs during the claims-handling process after a seaman's illness or injury has been reported.

Townsend's reasoning does no violence to *Miles*. It simply reflects the indisputable fact that the Jones Act does not address willful refusal to pay maintenance and cure. In contrast, as demonstrated above, the Jones Act **does** comprehensively address personal injury tort liability to a seaman. *Miles*, therefore, not *Townsend*, governs the result in this case. It was this fundamental fact, so central to *Miles*, that the Ninth Circuit failed to appreciate.

III. The Ninth Circuit Erred in Applying *Townsend* Rather than *Miles* to Allow Punitive Damages in an Unseaworthiness Action

With *Miles* and *Townsend* to light its way, the Ninth Circuit undertook its review of the district court's refusal to dismiss Batterton's request for punitive damages. Batterton asserted a demand for punitive damages in connection with his unseaworthiness claim.[60] Both his negligence and unseaworthiness claims sought damages for injuries he sustained when a hatch cover blew open and crushed his left hand.[61]

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[60] *Batterton*, 880 F.3d at 1090-91.

[61] *Id.*

The court initially acknowledged that *Townsend* addresses only maintenance and cure and holds simply "that *Miles* does not limit the availability of punitive damages in maintenance and cure cases."[62] But the court then proceeded to demonstrate its serious misunderstanding of *Miles* and *Townsend*, reasoning that *Townsend* extended "[b]y implication" to "other actions 'under general maritime law,' which includes unseaworthiness claims."[63]

In reaching this conclusion, the Ninth Circuit made three grave errors. First, the court misstated *Miles*'s holding, reasoning that *Miles* "held that damages 'for non-pecuniary loss . . . in a general maritime action' are barred."[64] This does not accurately or fully capture *Miles*'s holding. In fact, *Miles* "limits recovery to pecuniary loss,"[65] a very different proposition. By inserting a double negative, the Ninth Circuit made an error of logic that upended *Miles*. Under *Miles*, punitive damages are **not** recoverable because, as the Ninth Circuit and all parties agree, punitive damages are not compensation for "pecuniary loss."[66] Yet under the

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[62] *Id.* at 1092.

[63] *Id.* (quoting *Townsend*, 552 U.S. at 421).

[64] *Id.* at 1094 (quoting *Miles*, 498 U.S. at 32).

[65] 498 U.S. at 32.

[66] 880 F.3d at 1094. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 490-493 (2008) (punitive damages are "separate and distinct from compensatory damages" and "are aimed not at compensation but principally at retribution and deterring harmful conduct"); RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) (punitive

court of appeals' misreading of *Miles*, punitive damages are recoverable because they are not compensation for non-pecuniary loss.[67]

Second, after acknowledging that *Miles* "might arguably be read to suggest that the available damages for a general maritime unseaworthiness claim by an injured seaman should be limited to those damages permissible under the Jones Act for wrongful death," the court of appeals dismissed this reading as a "stretch."[68] This was so, the court of appeals reasoned, because *Miles* states that the Jones Act "evinces no general hostility to recovery under maritime law" and "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness."[69]

But these propositions in *Miles*, supported by citation to *Peterson*,[70] do not support the court's reasoning. In *Peterson*, a seaman's employer asserted that once a seaman claims maintenance and cure benefits, he may no longer seek compensatory damages under the Jones Act.[71] In holding that maintenance and

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damages are "awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future").

[67] *Id.* at 1094, 1096.

[68] *Id.* at 1095.

[69] *Id.* (quoting *Miles*, 498 U.S. at 29) (internal quotation marks omitted).

[70] 278 U.S. at 139.

[71] *Id.* at 132-33.

cure benefits were not an alternative to a personal injury tort claim for compensatory damages, this Court underscored that negligence and unseaworthiness arise from "a single wrongful invasion" and are "but a single legal wrong" for which a seaman "is entitled to but one indemnity by way of compensatory damages."[72] Thus, in stating that the Jones Act did not disturb a seaman's right to assert that the unseaworthiness of the vessel was responsible for his injuries, *Miles* in no way suggested that the Court could expand the limit on compensatory damages for seamen's injuries that Congress established with the Jones Act.

Third, the Ninth Circuit attempted to draw a policy distinction between personal injury and wrongful death claims.[73] But there is no statutory basis or policy rationale in an unseaworthiness case for awarding punitive damages when a seaman survives his injuries (Batterton), but prohibiting punitive damages when he does not (Miles). Nothing in the Jones Act (or in FELA, which it incorporates) draws any such distinction or suggests any such policy rationale. In fact, the Jones Act by its terms applies equally to claims for injury or death of a seaman.[74] The Jones Act therefore mandates rejection of the Ninth Circuit's attempt to distinguish *Miles*.

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[72] *Id.* at 138.

[73] 880 F.3d at 1096.

[74] 46 U.S.C. § 30104.

IV. The Ninth Circuit's Ruling Undermines the Viability of the Maritime Industry, Threatening Our Economy and National Security

The viability of the U.S. maritime industry is of great importance to our national security and to the stability of our transportation system. Many are unaware of the key role that waterborne transportation plays in the movement of goods and services throughout our nation. The tugboat, towboat and barge industry alone moves more than 760 million tons of goods worth nearly $300 billion every year,[75] allowing the U.S. to take advantage of one of its greatest natural resources – its 25,000-mile waterway system.

The maritime industry is important not only to everyday commerce; it also plays a crucial role in times of war or other national emergency. Following the September 11 terrorist attacks, vessels operated by AWO members and other members of the maritime community evacuated more than five hundred thousand people from lower Manhattan in just nine hours.[76] U.S.-flag merchant vessels are regularly called into service during times of war.

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[75] PRICEWATERHOUSECOOPERS LLP, ECONOMIC CONTRIBUTION OF THE US TUGBOAT, TOWBOAT, AND BARGE INDUSTRY, ES-1, 14 (2017), https://tinyurl.com/ybda3lhm.

[76] Thomas Allegretti, Remembering the Heroes of the 9/11 Boatlift, THE HILL (Sept. 11, 2014), https://thehill.com/blogs/congress-blog/homeland-security/217322-remembering-the-heroes-of-the-9-11-boatlift.

Congress understood the importance of a strong U.S. flag fleet when it passed the Jones Act, officially known as the Merchant Marine Act of 1920, shortly after our nation emerged from the First World War. Its provisions addressed the protection and promotion of U.S. shipyards, U.S. vessel owners, and American merchant mariners. Congress declared the purpose of the Merchant Marine Act of 1920 in Section 1, which states as follows:

> SEC. 1. PURPOSE AND POLICY OF UNITED STATES.
>
> It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine . . . . and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.[77]

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[77] Merchant Marine Act of 1920, ch. 250 §1, 41 Stat. at 988, currently codified as amended at 46 U.S.C. § 50501.

In undertaking this comprehensive approach to regulating and strengthening the domestic maritime industry, Congress included Section 33 of the Act, addressing recovery for injury to or death of a seaman.[78] This section of the Act incorporated FELA to set forth the correct parameters and standards for a seaman's right to bring a civil action to recover damages for on-the-job injuries or death.[79] As *Miles* makes clear, the incorporation of FELA meant, among other things, that Congress "must have intended to incorporate [FELA's] pecuniary limitation on damages" into seamen's civil actions for damages now allowed under the Jones Act.[80] In doing so, Congress struck a balance, given its purpose and "primary end" of developing and maintaining a strong domestic merchant marine fleet "sufficient to carry" the majority of the nation's commerce, and capable of serving as a "naval or military auxiliary in time of war or national emergency."[81]

The Ninth Circuit's ruling, if accepted by this Court, will have serious repercussions for AWO's members and the maritime industry more generally. Vessel

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[78] *Id.* § 33, 41 Stat. at 1007, currently codified at 46 U.S.C. § 30104. The Act does far more than regulate seamen's tort remedies. It includes, for example, laws protecting U.S. vessels engaged in coastwise trade, and legislation concerning mortgages to finance the construction or purchase of U.S. vessels.

[79] *Id.*

[80] *Miles*, 498 U.S. at 32-33.

[81] Merchant Marine Act of 1920, ch. 250 §1, 41 Stat. at 988, currently codified as amended at 46 U.S.C. § 50501.

owners will face increased litigation and a claim for punitive damages in nearly every seaman's personal injury case. The coercive and other harmful impacts of punitive damages claims are well documented, and Petitioner's summary of those impacts is scholarly and thorough.[82] The mere assertion of a claim for punitive damages, even if meritless, particularly in a claim that does not require proof of knowledge or fault on the part of the vessel owner, drastically increases the uncertainty and risk these cases pose. Vessel owners are generally unable to purchase insurance to protect their businesses against the risk of punitive damage claims, and the cost of defending against them, whether frivolous or not, can be overwhelming.[83]

All of this threatens the financial stability of the U.S. tugboat, towboat and barge industry. The economic pressures created by a punitive damages liability scheme could cause some vessel owners to fail and others to discontinue operations. It may reduce the number of jobs for U.S. mariners, and will almost certainly result in higher prices for consumers. In 1920, when Congress passed the Jones Act, it called for the development and encouragement of a strong U.S.

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[82] Pet'r's Br. 34-40.

[83] For a good discussion regarding the general unavailability of marine insurance for punitive damages, *see* Michael N. Brown, *Marine Insurance for Punitive Damages* (2014), https://www.ajg.com/media/1615159/marine-insurance-forpunitive-damages.pdf.

domestic merchant marine fleet.[84] Affirming the Ninth Circuit's holding would undermine that goal.

Most important, the Ninth Circuit's decision is contrary to the benchmark policy of federal maritime law: uniformity. In *Miles*, this Court recognized the intent of Congress to make federal maritime law uniform and predictable.[85] Congress intended that "federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'"[86] In accordance with this "constitutionally based principle,"[87] maritime law is "a conceptual body whose cardinal mark is uniformity."[88] This fundamental principle of uniformity, with its "companion quality of predictability," benefits all members of the maritime community.[89]

It is important to recognize that the issue before the Court is not whether seamen should be adequately compensated for on-the-job injuries. The remedies allowed by Congress and the Court in *Miles* permit robust compensatory damages for seamen upon proof of negligence or unseaworthiness. The question is

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[84] Merchant Marine Act of 1920, ch. 250 §1, 41 Stat. at 988, currently codified as amended at 46 U.S.C. § 50501.

[85] 498 U.S. at 26-27.

[86] *Id.* at 27 (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970)).

[87] *Id.*

[88] *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983).

[89] *Id.*

whether this Court should on its own judgment add punitive damages to the arsenal of tort remedies already chosen with care by Congress, and thus "sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases . . . resulting from negligence."[20] This Court should decline to do so.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals is contrary to the policies and principles espoused by Congress and this Court. The Court should hold that punitive damages are not available in a seaman's action for injury or death based upon the general maritime duty to provide a seaworthy vessel. It should reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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[20] *Miles*, 498 U.S. at 32-33.

No. 18-266

In the Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF AT-SEA PROCESSORS ASSOCIATION, PACIFIC SEAFOOD PROCESSORS ASSOCIATION, GROUNDFISH FORUM, NATIONAL FISHERIES INSTITUTE, FREEZER LONGLINE COALITION, AND ALASKA BERING SEA CRABBERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF AT-SEA PROCESSORS ASSOCIATION, PACIFIC SEAFOOD PROCESSORS ASSOCIATION, GROUNDFISH FORUM, FREEZER LONGLINE COALITION, NATIONAL FISHERIES INSTITUTE, AND ALASKA BERING SEA CRABBERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The At-sea Processors Association (APA) represents six companies that own and operate sixteen U.S.-flagged catcher/processor vessels that participate principally in the Alaska pollock fishery and west coast Pacific whiting fishery. By weight, these fisheries account for more than one-third of all fish harvested in the United States each year.

Pacific Seafood Processors Association (PSPA) is a nonprofit seafood industry trade association. Its corporate members are major seafood processing companies with operations in Alaska and Washington. PSPA was founded in 1914 to foster a better public understanding of the importance of the seafood industry and has been in continuous and active operation since that time.

Groundfish Forum (GF) is a trade association that represents five companies that operate 19 trawl catcher processor vessels in the yellowfin sole, rock sole, flathead sole, Atka mackerel, Pacific Ocean

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Both parties have filed blanket consents to the filing of *amicus* briefs with the Clerk.

perch, and Pacific cod fisheries off Alaska. GF's mission is to promote the sustainable harvest and economic viability of fisheries while ensuring resource conservation, habitation protection, and practicable bycatch management.

The Freezer Longline Coalition (FLC) is a trade association representing participants in the freezer longline sector of the Alaska cod fishery. FLC includes 11 Washington and Alaska-based members that operate 30 vessels in the federal waters of the Bering Sea, Aleutian Islands, and the Gulf of Alaska. FLC members are united in their commitment to sustainable fishing practices in the North Pacific.

The National Fisheries Institute (NFI) represents hundreds of companies from all facets of the commercial seafood industry in the United States, including seafood harvesters, vessel owners, and processors dependent on those harvesters for product. NFI member companies produce, process, distribute, and serve to hundreds of millions of American consumers a sustainable, highly nutritious protein.

Members of the Alaska Bering Sea Crabbers (ABSC) fish for King, Snow, and Bairdi crab in the Bering Sea. They are also actively involved in scientific research, policy development, and marketing. ABSC is committed to ensuring the long-term sustainability of its members' fishery.

Amici's members have a strong interest in the resolution of this case. As marine operators, each is subject to the Jones Act and to general maritime law doctrines such as unseaworthiness. *Amici* file this brief to explain why permitting plaintiffs to recover punitive damages in connection with unseaworthi-

ness claims would be harmful to the American maritime industry and incongruent with long-standing legal doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

The maritime industry is the lifeblood of the economy of the United States—and of the world. It transports 90 percent of the world's goods.[2] It directly and indirectly accounts for 2.6 million American jobs and contributes $100 billion to the U.S. economy annually.[3] And it contributes hundreds of billions of dollars' worth of fish each year to the food supply.[4] The Ninth Circuit's holding that punitive damages are available under the maritime doctrine of unseaworthiness threatens to subject this critical industry to a potentially massive increase in damages exposure—a result that is erroneous as a matter of law and misguided as a matter of policy. This Court should therefore reverse the judgment below and hold that punitive damages may not be recovered for unseaworthiness claims.

The doctrine of unseaworthiness is the predominant means of recovery for seamen injured on the job. The impact of making punitive damages available for unseaworthiness claims, therefore, would be sweeping: Maritime operators' litigation costs would

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[2] See Natasha Geiling, *How the Shipping Industry Is the Secret Force Driving the World Economy*, Smithsonian.com, Oct. 15, 2013, perma.cc/E3R6-X8EN.

[3] Navy League of the U.S., *America's Maritime Industry* 14, perma.cc/AA7W-PAZB.

[4] See NOAA, Press Release, U.S. Fishing Generated More Than $200B in Sales in 2015; Two Stocks Rebuilt in 2016, May 9, 2017, perma.cc/C58Y-FVN3.

markedly increase, resulting in higher prices for consumers, and the U.S. maritime industry would be put at a disadvantage compared with industries in countries whose law precludes punitive damages.

The decision below not only threatens grave harm to the maritime industry; it is also wrong on the merits. There appear to be no cases awarding punitive damages in connection with an unseaworthiness claim before the enactment of the Jones Act in 1920. And even if respondent were able to locate an aberrational punitive award in a pre-Jones Act unseaworthiness case, the dramatic changes in the purpose, size, and frequency of punitive damage awards since that time counsel against allowing punitive damages in such cases today. Moreover, permitting punitive damages in unseaworthiness cases would destroy the uniformity between the unseaworthiness remedy and the Jones Act remedy and would lead to windfall recoveries in situations in which Congress clearly intended that plaintiffs recover only compensatory damages. For all of these reasons, the decision below should be reversed.

ARGUMENT

A. Permitting Punitive Damages In Unseaworthiness Cases Would Disrupt The Maritime Industry And The National Economy.

Allowing plaintiffs to recover punitive damages in connection with unseaworthiness claims would have a critical impact on the U.S. maritime industry. Vessel owners' potential liability, and their vulnerability to settlement pressure, would rise dramatically—causing an increase in litigation costs that would make these companies less competitive with foreign

maritime operators and increase the prices that their consumers pay.

1. As this Court observed almost fifty years ago, "[t]he unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 399 (1970); see also *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 208 (1996) (unseaworthiness has "eclipsed ordinary negligence as the primary basis of recovery when a seafarer was injured or killed"). The question whether punitive damages are available in unseaworthiness actions is thus a matter of paramount importance.

Opening the door to punitive damages in unseaworthiness cases would make such cases far more difficult for defendants to litigate. As a leading authority on tort law has explained, the "risk of suffering a crushing punitive damages penalty" discourages defendants from litigating claims on the merits, leading to "so-called 'blackmail settlements'" in which claims are settled for more than they are "reasonably worth." James A. Henderson, Jr., *The Impropriety of Punitive Damages in Mass Torts*, 52 GA. L. REV. 719, 747 (2018). Indeed, "uncounted thousands of cases settle on terms different than those on which they would otherwise settle because of the possibility of punitive damages." Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 625 (1997).

This Court has recognized the same dynamic in the class-action context, where class certification—or even the mere styling of a lawsuit as a putative class action—exerts tremendous pressure on a defendant

to settle. See, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (describing "the risk of 'in terrorem' settlements that class actions entail"); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

To be sure, this Court has held that punitive damages in maritime cases generally should not exceed the amount of compensatory damages (*Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 513 (2008)), and that guidance would presumably apply to punitive damages for unseaworthiness if such damages were held to be available. But since the decision in *Exxon Shipping*, courts have *not* uniformly limited punitive damages to the amount of compensatory damages in maritime cases. See, *e.g.*, *Warren* v. *Shelter Mut. Ins. Co.*, 233 So. 3d 568, 599 (La. 2017) (reducing $23 million punitive award to $4.25 million where compensatory damages were $125,000 on ground that $4.25 million is twice the total value of the court's estimation of the harm caused by the conduct); *McWilliams* v. *Exxon Mobil Corp.*, 111 So. 3d 564, 579 (La. Ct. App. 2013) (upholding $12 million punitive award in case involving $5.5 million in actual damages); *Clausen* v. *Icicle Seafoods, Inc.*, 272 P.3d 827, 834, 836 (Wash. 2012) (refusing to reduce $1.3 million punitive award where compensatory damages for maintenance and cure were $37,420 and attorneys' fees and costs, which court included in denominator, were $428,105). Moreover, even a 1:1 cap would be cold comfort, because compensatory damages in unseaworthiness

cases can reach into the multiple millions of dollars.[5] Even allowing double the already-considerable damages available in unseaworthiness cases would put maritime operators in a highly precarious position.

The predictable effect of making punitive damages available in unseaworthiness cases, therefore, will be to coerce maritime defendants into settling even dubious unseaworthiness claims, raising their litigation costs. Because those costs are likely to be passed on to consumers, the result will be higher prices for fish and any other commodity harvested or transported by ships.[6]

2. Permitting punitive damages in this context would also undermine the American maritime industry's ability to compete with other countries. Many European countries follow the civil-law tradition, under which punitive damages are generally una-

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[5] See, *e.g.*, *Doss* v. *M/V K2*, 2016 WL 6962501, at *2 n.13 (E.D. La. Nov. 29, 2016) (indicating that plaintiff was seeking $1.5 million in compensatory damages); *Burdett* v. *Matson Navigation Co.*, 2015 WL 419694, at *1 (D. Haw. Jan. 30, 2015) (indicating that plaintiff was seeking $7 million in compensatory damages).

[6] The fact that grave consequences have not followed from this Court's decision in *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404 (2009), which made punitive damages available in maintenance-and-cure cases, does not mean that the effects of a ruling for respondent here would be similarly benign. As the respondent in *Townsend* conceded, instances of willful failure to provide maintenance and cure are "rare." Resp. Br. at 32, *Townsend* (U.S. Jan. 19, 2009), 2009 WL 154578. By contrast, punitive damages claims under the doctrine of unseaworthiness—the "principal vehicle for recovery" by injured seamen (*Moragne*, 398 U.S. at 399)—will likely be much more common and the amounts at stake in such cases much more substantial.

vailable in civil cases. See John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507, 510 & n.16 (2007) (citing sources from Switzerland, Italy, Belgium, Spain, Germany, Finland, Greece, Poland, Russia, the Czech Republic, and the Netherlands); see also *Exxon Shipping*, 554 U.S. at 497 ("Noncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries as France, Germany, Austria, and Switzerland."). The same is true in Japan. See 2 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 22.2(B)(10) (7th ed. 2015). And in China, punitive damages are available only in certain consumer cases. See Vincent R. Johnson, *Punitive Damages, Chinese Tort Law, and the American Experience*, 9 FRONTIERS L. CHINA 321, 321-22 (2014).

Under respondent's view, therefore, maritime defendants' damages exposure would be dramatically greater under U.S. maritime law than under the law of other nations. Imposing that potential liability on the American maritime industry would undoubtedly raise the industry's costs—driving business toward maritime companies that use ships flagged in other countries and that have less exposure to U.S. maritime law. For example, with the single exception of Canada-flag tuna vessels fishing in U.S. waters under the U.S.-Canada Albacore Treaty, *amici* are unaware of any foreign-flagged vessels permitted to fish anywhere in the nation's Exclusive Economic Zone. Thus, affirming the decision below would raise costs for U.S. seafood harvesters but would not affect foreign harvesters who fish outside the United States

and export their catch to the U.S. market.[7] It would also encourage foreign plaintiffs to bring claims in U.S. courts, where punitive damages would now be available. Cf. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 403-04 (1975) ("[T]he United States is now virtually alone among the world's major maritime nations in not adhering to the [Brussels Collision Liability] Convention with its rule of proportional fault—a fact that encourages transoceanic forum shopping.").

B. The Decision Below Is Erroneous.

Fortunately, these deleterious effects need not be suffered, because the court of appeals' decision is wrong on the merits. That is so, first and foremost, because, as petitioner explains (Pet. Br. 26-30), the court of appeals' decision cannot be reconciled with this Court's holding in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990). But even leaving *Miles* aside, the decision below is indefensible—because there is no historical precedent for awarding, in unseaworthiness cases, modern-day punitive damages, and because awarding such damages in unseaworthiness cases would undermine the remedial scheme of the Jones Act.

1. The court of appeals' decision rests on an inapposite premise. In concluding that punitive damages should be available for unseaworthiness claims,

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[7] To be sure, under the multifactor test articulated by this Court in *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953), a tort involving a foreign-flagged ship may sometimes be adjudicated under U.S. maritime law. But this is the exception rather than the rule. As the Court explained in *Lauritzen*, "the weight given to the [flag] overbears most other connecting events in determining applicable law." *Id.* at 585.

the court of appeals relied on this Court's statement in *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404, 407 (2009), that, "[h]istorically, punitive damages have been available and awarded in general maritime actions." Based on that statement, the court of appeals assumed that punitive damages were available in unseaworthiness cases prior to the passage of the Jones Act. Pet. App. 12a.

But the *Townsend* Court's statement, made in a maintenance-and-cure case, does not apply in the context of unseaworthiness actions. At least one study has found some evidence of punitive damages being awarded or contemplated in nineteenth-century maintenance-and-cure actions. David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 118 (1997).[8] By contrast, the same study—along with a canvass by five concurring judges on the Fifth Circuit—identified only *one* early unseaworthiness case that even arguably involved an award of punitive damages. See *McBride* v. *Estis Well Serv., LLC*, 768 F.3d 382, 395-96 (5th Cir. 2014) (en banc) (Clement, J., concurring); Robertson, *supra*, at 107-08. And that case, *The Rolph*, 293 F. 269 (N.D. Cal. 1923), is far too slender a reed to support making punitive damages available in unseaworthiness cases. *The Rolph* did not purport to award any punitive or exemplary damages, or

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[8] This historical precedent for awarding punitive damages in maintenance-and-cure cases cannot support making punitive damages available in unseaworthiness cases; as this Court has recognized, the maintenance-and-cure cause of action—a contract-based cause of action by which sick or injured seamen can recover expenses while recuperating—is "unlike" the "indemnity" created for unseaworthiness. *Aguilar* v. *Standard Oil Co. of N.J.*, 318 U.S. 724, 730 (1943).

even mention the possibility of doing so; rather, the court based the plaintiffs' damages on their "injuries" and their "expectation of life and earnings." *Id.* at 272. And in any event, the case *post*dated the passage of the Jones Act in 1920 and thus cannot support the notion that punitive damages were awarded in unseaworthiness cases prior to the Jones Act.

The lack of historical precedent for punitive damages in unseaworthiness cases is corroborated by the fact that, during the thirty years after the passage of the Jones Act (1920-1950), injured seamen almost exclusively brought Jones Act claims rather than unseaworthiness claims. *McBride*, 768 F.3d at 397 & n.20 (Clement, J., concurring) (citing G. Gilmore & C. Black, The Law Of Admiralty 327 (2d ed. 1975)). That choice would have been irrational if punitive damages could be awarded in connection with unseaworthiness claims while being unavailable in connection with Jones Act claims. *Ibid.* In short, there is no basis upon which to conclude that punitive damages were historically available in connection with unseaworthiness claims.

2. Moreover, even if courts *had* awarded (or purported to award) "punitive" damages in some unseaworthiness cases in the years preceding the enactment of the Jones Act, that would not warrant allowing recovery of punitive damages appurtenant to unseaworthiness claims now. The nature and purpose of punitive damages have changed too much over the past century for pre-Jones Act cases to provide any meaningful precedent for awarding punitive damages in unseaworthiness cases today.

Today, punitive damages are thought of as serving exclusively punitive purposes: *i.e.*, inflicting retribution on the defendant and deterring the defend-

ant and others from committing similar misconduct in the future. See, *e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568 (1996) (explaining that punitive damages "further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"). As such, they are often imposed in astonishing amounts. See, *e.g.*, *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. Since then, awards more than 30 times as high have been sustained on appeal.") (citation omitted).

But punitive damages, as originally conceived in English courts, were nothing more than "a means of justifying damage awards in excess of the plaintiff's tangible harm." See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 614 (2003). Thus, although courts sometimes spoke of punitive damages as serving the purpose of deterrence, they "[j]ust as frequently * * * justified punitive damages as additional compensation for mental suffering, wounded dignity, and injured feelings—harms that were otherwise not legally compensable at common law." *Id.* at 615 (footnote omitted); see also, *e.g.*, Schlueter, *supra*, § 1:3 (explaining that when they were originally recognized, "punitive damages had the unique function of compensating for the incompensable intangible harms which would not normally be recognized at common law").

When the doctrine of punitive damages crossed the Atlantic to the United States, this compensatory justification for the doctrine persisted: As this Court has explained, "punitive damages * * * operated to compensate for intangible injuries" "[u]ntil well into the 19th century." *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 n.11 (2001). "So strong, in fact, were the compensatory roots of punitive damages that, in the mid-nineteenth century, many courts and scholars rejected the notion that punitive damages served any punitive purpose at all." Colby, *supra*, at 617. It was not until more recently, "[a]s the types of compensatory damages available to plaintiffs * * * broadened," that "the theory behind punitive damages * * * shifted toward a more purely punitive" one. *Cooper Indus.*, 532 U.S. at 437 n.11.

In light of this evolution in the purpose of punitive damages, even hard historical evidence of punitive damages being awarded in unseaworthiness cases in the nineteenth century—evidence that does not exist—would not be an adequate basis for holding that punitive damages may be awarded for unseaworthiness claims in the twenty-first century. Any "punitive" damages in early unseaworthiness cases would have been relatively modest in amount and would have served, at least in part, a compensatory function. That is a far cry from the sort of punitive damages that would be available under respondent's approach, which would be substantial—even exceeding compensatory damages (see p. 6, *supra*)—and aimed solely at punishing the defendant.

3. Irrespective of whether punitive damages were available in unseaworthiness cases prior to the Jones Act, it would not make sense to permit them to

be recovered in unseaworthiness cases today, in light of the passage of the Jones Act and the close relation between the two causes of action.

Unseaworthiness claims and Jones Act claims—and the remedies available thereunder—have long been closely linked. Congress enacted the Jones Act in response to this Court's holding in *The Osceola*, 189 U.S. 158, 175 (1903), that a seaman was "not allowed to recover an indemnity for the negligence of the master, or any member of the crew." The negligence action brought into being by the Jones Act was thus "an alternative" to a traditional unseaworthiness claim, and a seaman accordingly was entitled to recover under a negligence theory or an unseaworthiness theory, but not both. *Pac. S.S. Co.* v. *Peterson*, 278 U.S. 130, 138 (1928). That was so, this Court explained, because whether "the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew," or both, "there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to but *one indemnity by way of compensatory damages*." *Ibid.* (emphasis added) (citation omitted).

The rule requiring a seaman to choose between an unseaworthiness claim and a Jones Act claim has since been abrogated (see *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 222 & n.2 (1958)), but the two remedies remain closely related. Indeed, in light of the judicial expansion of the unseaworthiness cause of action over the course of the twentieth century, the two remedies now substantially overlap. See Gilmore & Black, *supra*, at 383. Today, many, if not most, plaintiffs can bring unseaworthiness claims to recover for injuries for which the *only*

available remedy at the time of the Jones Act's passage would have been a Jones Act negligence claim. See *McBride*, 768 F.3d at 400-01 (Clement, J., concurring).

In light of the increased overlap between Jones Act and unseaworthiness claims in modern times, the notion that punitive damages may be awarded in connection with unseaworthiness claims is untenable. It has long been established that punitive damages are not available under the Jones Act, because the Jones Act incorporated "unaltered" the remedies available under the Federal Employers Liability Act (FELA), which do not include punitive damages. *Miles*, 498 U.S. at 32; see *McBride*, 768 F.3d at 388 ("Because the Jones Act adopted FELA as the predicate for liability and damages for seamen, no cases have awarded punitive damages under the Jones Act."); *Miller* v. *Am. President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) ("Punitive damages are not * * * recoverable under the Jones Act."); *Bergen* v. *F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987), *opinion modified on reh'g*, 866 F.2d 318 (9th Cir. 1989) ("Punitive damages are non-pecuniary damages unavailable under the Jones Act."). If the Ninth Circuit were correct that punitive damages *are* available for unseaworthiness claims, which now can effectively replicate Jones Act claims, Congress's intent in the Jones Act to limit seamen's right of recovery to compensatory damages would be thwarted by judicial fiat.

Indeed, permitting the recovery of punitive damages in unseaworthiness cases could relegate the Jones Act to near-complete irrelevance. Plaintiffs would have little reason to bring a Jones Act claim, which requires proof of negligence and offers only

compensatory relief, if they could bring an unseaworthiness claim, which offers the promise of strict liability (*Yamaha*, 516 U.S. at 208) and—as respondent sees it—the potential for punitive damages. Perhaps plaintiffs would continue to join Jones Act claims to unseaworthiness claims in order to ensure that both would be tried to a jury. Cf., *e.g.*, *Fitzgerald* v. *U.S. Lines Co.*, 374 U.S. 16, 21 (1963) (holding that, although jury trials are not required in admiralty cases, "a maintenance and cure claim joined with a Jones Act claim must be submitted to the jury when both arise out of one set of facts"). But that outcome—in which the Jones Act would serve, at most, as a vehicle for obtaining a jury trial on a different cause of action—cannot be squared with the "uniform plan of maritime tort law Congress created in * * * the Jones Act." *Miles*, 498 U.S. at 37. The only way for this Court to honor Congress's intent in enacting the Jones Act is to hold that punitive damages may not be recovered in unseaworthiness cases.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 18-266

IN THE

Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND INTERNATIONAL GROUP OF P&I CLUBS SUPPORTING PETITIONER

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BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND INTERNATIONAL GROUP OF P&I CLUBS SUPPORTING PETITIONER

INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An

[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the Nation's business community.

This case raises critically important issues related to the respect due to congressional policy decisions on the availability of extra-statutory punitive damages remedies, and it concerns the proper role of courts in expounding upon the common law of punitive damages awards under federal maritime law. The Chamber has a vital interest in promoting a predictable, rational, and fair legal environment for its members. And the Chamber's knowledge of the practical implications for the business community should assist the Court.

The International Group of P&I Clubs is an association comprising thirteen mutual insurance associations that insure nearly 90% of the world's ocean-going ship tonnage. The Clubs cover, among other things, personal injury and death claims for seafarers. Their members are owners, operators, and charterers of ships of practically all maritime nations. And the Clubs provide coverage for many thousands of U.S. vessels. The International Group of P&I Clubs has a strong interest in evenhanded rules governing international commerce. Since punitive damages are not available under many nations' laws, the International Group of P&I Clubs believes that imposing them on the American shipping industry would both be unfair and have deleterious effects worldwide.

SUMMARY OF ARGUMENT

Allowing punitive damages for unseaworthiness claims would undermine the Framers' purpose for granting the federal courts maritime jurisdiction. The "fundamental interest giving rise to [the grant of] maritime jurisdiction is the protection of maritime commerce." *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 25 (2004) (emphasis and internal quotation marks omitted). And this interest is furthered by the Court's well-established goal of ensuring "uniformity and consistency" in maritime law. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874).

But maritime law would be severely disrupted if punitive damages were allowed for unseaworthiness claims. Despite this Court's efforts to rein in punitive damages awards, they continue to pose a multimillion-dollar risk in maritime cases. State courts in maritime cases occasionally allow juries to award punitive damages far beyond the amount of compensatory damages. And compensatory damages for unseaworthiness claims can be significant. So even if a court adhered to capping punitive damages at the amount of compensatory damages, maritime businesses would face stifling litigation risks.

These risks, moreover, would be quite unpredictable. Simply put, it is often impossible for a maritime defendant to know with any degree of certainty whether its particular case will be one of the unlucky ones that result in an arbitrary award of massive punitive damages. This Court has already acknowledged the "stark unpredictability of punitive awards," recognizing this as a serious "problem." *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 499 (2008). And there has been a wide range of damages awarded for unseaworthiness claims. Plus, the availability of punitive damages should not turn on whether a plaintiff pleads a common-law

unseaworthiness cause of action versus a statutory Jones Act cause of action. But that is exactly what the Ninth Circuit's decision will entail. And the availability of unseaworthiness punitive damages certainly should not turn on the illogical factor adopted by the Ninth Circuit that punitive damages are available if a seaman survives his injuries—but not if he dies.

Making matters even worse, these risks of unpredictable, sizable punitive damages awards are particularly pernicious because many States do not permit insurance coverage for punitive damages. This combination of large potential exposure, unpredictability, and uninsurability make punitive damages a serious threat to maritime commerce. They create an "in terrorem" effect similar to the class action context. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011). The result is that risk-averse maritime defendants are forced into overpriced settlements, even on questionable unseaworthiness claims. The downside risk is simply too great to take a chance at trial.

The costs of those overpriced settlements extend far beyond the payments themselves. They deter desirable economic conduct. Because these claims would be settled for more than their fair value, this price inefficiency would cause maritime businesses to overcorrect and engage in wasteful precautions and other economically inefficient activity. That hurts everyone because it adds costs to maritime shipping, which is often the most efficient and cost-effective means of transporting goods. Virtually all sectors of the economy would incur these new costs, which will become embedded in the price of countless goods.

Additionally, it is particularly unfair to impose these significant costs on *American* maritime commerce. Since maritime commerce occurs largely in international waters, this industry competes directly with foreign

maritime businesses. Yet many countries around the world, using the civil-code tradition, do not allow punitive damages for maritime claims. That means these foreign maritime businesses would have a competitive advantage, thus inhibiting American maritime commerce instead of "protect[ing]" it. *Kirby*, 543 U.S. at 25.

Congress has already recognized the problems in this context by rejecting punitive damages in the Jones Act, which created a statutory claim to address the same legal injury covered by a common-law unseaworthiness claim. A plaintiff should not be able to obtain a court-created remedy under the common law when Congress prohibited such a remedy in a statute. This Court has acknowledged—particularly in the maritime context—that proper respect should be accorded to Congress's determinations about policy-based judgments. Congress, here, has already performed the cost-benefit analysis, and it has determined that punitive damages should not be available for maritime personal injury claims.

In sum, the availability of punitive damages for unseaworthiness claims would upset the ordered, uniform system of maritime law, impose steep and pernicious costs on the American maritime industry, and thwart the will of Congress. The Court should reverse the Ninth Circuit's decision.

ARGUMENT

I. THE FRAMERS' FUNDAMENTAL INTEREST IN PROTECTING MARITIME COMMERCE WOULD BE UNDERMINED BY ALLOWING PUNITIVE DAMAGES FOR UNSEAWORTHINESS CLAIMS.

The Framers vested federal courts with maritime jurisdiction to protect maritime commerce. The Constitution extends the federal "judicial power" to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2. Likewise, Congress has long vested federal district courts with original jurisdiction in "[a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1333(1). As this Court has repeatedly reiterated, the "fundamental interest giving rise to [this grant of] maritime jurisdiction is the protection of maritime commerce." *Kirby*, 543 U.S. at 25 (emphasis and internal quotation marks omitted); *Exxon Corp.* v. *Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991); *Sisson* v. *Ruby*, 497 U.S. 358, 367 (1990).

Consequently, this Court has long recognized the necessity for "uniformity and consistency" in maritime law. *The Lottawanna*, 88 U.S. (21 Wall.) at 575. The fundamental interest in protecting maritime commerce "cannot be fully vindicated unless 'all operators of vessels on navigable waters are subject to uniform rules of conduct.'" *Sisson*, 497 U.S. at 367 (quoting *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 675 (1982) (emphasis omitted)).

Far from fulfilling the Framers' aim of "protecti[ng] * * * maritime commerce," *Kirby*, 543 U.S. at 25, allowing punitive damages for unseaworthiness claims would imperil American maritime commerce and saddle the economy with pernicious new costs. Those costs would be substantial, unpredictable, and uninsurable in some jurisdictions. For all of those reasons, they would overdeter socially beneficial behavior.

A. One of the most salient facts about punitive damages awards is their size. *Baker* did hold that punitive damages generally should not exceed the amount of compensatory damages when punitive damages are available in maritime cases. 554 U.S. at 513-514. But this cap has proven to be less effective in practice than it might seem in theory.

Punitive damages can pose a multimillion-dollar risk in maritime cases. As an initial matter, "[n]otwithstanding the Supreme Court's ruling, state courts [in maritime cases] occasionally allow juries to award punitive damages in excess of the 1:1 ratio[], sometimes far in excess." Ronneberg, *Life Preserver: An Overview of U.S. Maritime Law for Non-Maritime Lawyers*, 26 U.S.F. Mar. L.J. 1, 38 (2014). (Those cases fall outside the scope of the Jones Act and unseaworthiness claims. See, *e.g.*, *Clausen* v. *Icicle Seafoods, Inc.*, 272 P.3d 827, 834-836 (Wash. 2012) (upholding a $1.3 million punitive damages award on a maintenance-and-cure claim despite the jury awarding only $37,420 in compensatory damages).)

And even when courts do enforce the cap, the punitive damages may still be substantial because plaintiffs can secure large compensatory damages awards in maritime cases. See, *e.g.*, *Lodot* v. *Smith Marine Towing Corp.*, 455 F. App'x 417, 421 (5th Cir. 2011) (upholding a $1.8 million compensatory damages award); *Garner* v. *Energy Transp. Corp.*, No. 95-7969, 1996 WL 346631, at *1 (2d Cir. 1996) (upholding a $1.1 million compensatory damages award).

B. Like most businesses, maritime businesses have a substantial interest in and need for predictability in connection with business risks and costs. As a result, maritime law has always emphasized uniformity and consistency. See *The Lottawanna*, 88 U.S. (21 Wall.) at

575. But punitive damages present a real and inherent danger of arbitrariness.

Against the backdrop of enormous potential punitive damage awards, it would be extremely difficult for maritime entities to predict when unseaworthiness punitive damages would be awarded and how large those damages could be. The Court has acknowledged the "stark unpredictability of punitive awards," recognizing this as a serious "problem." *Baker*, 554 U.S. at 499; see also Sunstein et. al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2076 (1998) (chronicling the "systematic evidence of unpredictability" of punitive damages awards). So permitting punitive damages for unseaworthiness claims would be particularly disruptive to the uniformity and predictability that is vital to maritime law.

General concerns about the unpredictability of punitive damages would apply with full force to unseaworthiness claims. As noted above, both compensatory and punitive damage awards in this context have varied widely. *See* p.7, *supra*. But there are multiple other ways in which punitive damage awards for unseaworthiness claims, in particular, would be unpredictable and undermine maritime uniformity.

The availability of punitive damages for a particular maritime injury would turn not on some objectively reasonable factor, but rather on the type of claim the plaintiff chooses to assert. As explained in more detail below, punitive damages are not available under the Jones Act, and a Jones Act claim is an alternative, overlapping remedy to a common-law unseaworthiness claim. See pp.14-15, *infra*; Pet. Br. 17-21. In an ordered, uniform system of maritime law, punitive damages would not be available for this alternative common-law unseaworthiness claim when they are prohibited for the remedially similar Jones Act statutory claim. Permitting

that weighty remedy to turn on whether a plaintiff asserts an alternative common-law claim for the same injury fractures the "uniformity and consistency" that should be the hallmark of maritime law. *The Lottawanna*, 88 U.S. (21 Wall.) at 575.

In fact, a system where a plaintiff can obtain punitive damages by pleading one type of claim but not another harkens back to the "meaningless formulas and distinctions" of common-law pleading that the law left behind nearly a century ago. Sugarman & Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?*, 42 Am. U.L. Rev. 1465, 1487 (1993); see Redish & Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 Minn. L. Rev. 1303, 1308-1310 (2006) (chronicling the "frustrat[ion] with the common law pleading system" that provided the impetus for the Rules Enabling Act and the Federal Rules of Civil Procedure).

Furthermore, at least under the Ninth Circuit's reasoning below, the availability of punitive damages would depend on a further illogical factor—that the seaman did not die from his injuries. The Ninth Circuit tried to avoid this Court's straight-forward pronouncement in *Miles* v. *Apex Marine Corp.* that the Jones Act "forecloses more expansive remedies in a general maritime action [for unseaworthiness]." 498 U.S. 19, 36 (1990). To evade this clear language, the Ninth Circuit asserted that *Miles*' general pronouncement was somehow only "based on the restrictive recoveries permitted for wrongful death," which "have no application to general maritime claims by living seamen for injuries." Pet. App. 14a. In other words, punitive damages would be available if a seaman lives—but not if he dies. That distinction makes no sense and cannot be squared with this Court's clear command. *Miles* opined

on the remedies available "for seamen's *injury or* death," 498 U.S. at 36 (emphasis added), and the Jones Act prohibits punitive damages for both personal injury and wrongful death claims, see Pet. Br. 26-28.

The Ninth Circuit's effort to shove the square peg of punitive damages into the round hole of an unseaworthiness claim introduces additional disunity and unpredictability into maritime law. Two seamen who are injured by the same conduct in the same circumstances should have the same remedies available to them. The availability of punitive damages hinging on arbitrary factors like those identified by the Ninth Circuit drastically undermines the order, uniformity, and predictably of maritime law.

C. This multimillion-dollar risk of unpredictable punitive damages in maritime cases is particularly pernicious because "punitive damages are not insurable in all courts." Yetka, *Insurance Coverage for Punitive Damages*, 44-FALL Brief 18, 28 (ABA 2014). "[C]ertain jurisdictions hold that public policy prohibits enforcement of [a] clause in [an] insurance contract insuring against punitive damages." Plitt et al., 12 Couch on Ins. § 172:43 (2018); see also Davis, *Insurance Coverage for Punitive Damages—Time for A Uniform Rule Under General Maritime Law*, 12 Loy. Mar. L.J. 156, 162 (2013) (noting the "sharply divided state law addressing whether punitive damages are insurable"). And even in jurisdictions that permit such coverage, insurance companies sometimes will not, as a matter of policy, insure that extreme risk. This potential uninsurability heightens the dangers that punitive damages pose to maritime defendants.

The large, unpredictable potential exposure combined with uninsurability make punitive damages a troubling threat to maritime commerce. These factors combine to create an "in terrorem" effect similar to the class action

context. *Concepcion*, 563 U.S. at 350. "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Ibid.* Indeed, "[t]he risk of suffering a crushing punitive damages penalty gives rise to so-called 'blackmail settlements' in which defendants pay more than the * * * claims are reasonably worth." Henderson, *The Impropriety of Punitive Damages in Mass Torts*, 52 Ga. L. Rev. 719, 747 (2018); see also Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions*, 60 Baylor L. Rev. 880, 916 (2008) (demonstrating that the presence of punitive damages "increases exponentially" the pressure to settle and "creates acute settlement leverage"); Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623, 625 (1997) ("Perhaps uncounted thousands of cases settle on terms different than those on which they would otherwise settle because of the possibility of punitive damages.").

If maritime businesses cannot adequately predict the scope of potential punitive damage liability, they will be forced into overpriced settlements. Rather than litigate to final judgment an unseaworthiness claim, a maritime business would face significant pressure to settle the case simply to avoid a significant punitive damages award. This, too, undermines uniformity and consistency that should be the hallmark of maritime law.

D. The overpriced settlements that unseaworthiness plaintiffs could extract will come at a significant cost. The American maritime industry will pay that cost not only in the form of the substantial settlements themselves, but also by the attendant overdeterrence of desirable economic activity.

Liability for wrongful conduct must be commensurate with the wrong involved so businesses can put in place appropriate deterrents to wrongful conduct. This interest

is substantially undermined by punitive damages. The likely effect of allowing such an award is to make maritime commerce (and hence the goods transported in it) more expensive by injecting greater uncertainty into the system.

As many have recognized, "[t]hreats of blockbuster punitive damages * * * produce undesirable deterrent effects on corporate defendants' behavior." Henderson, *supra*, at 746. The inherent unpredictability of punitive damages exacerbates this problem, because "a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies." Sunstein et al., *supra*, at 2077. "[C]ourts generally pay insufficient attention to the potential problem of overdeterrence" when analyzing punitive damages issues. Polinsky & Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 899 (1998). Yet significant economic and social costs result from the "wasteful precautions and the withdrawal of socially valuable products and services from the marketplace" caused by the threat of punitive damages. *Id.* at 900; see also Sunstein et al., *supra*, at 2077 ("[U]npredictable [punitive damages] awards create both unfairness and (on reasonable assumptions) inefficiency, in a way that may overdeter desirable activity."); Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 326 (1998) ("The threat of punitive damages can have a chilling effect on corporate behavior.").

The partial availability of insurance for punitive damages will not dampen these costs, but merely translate them into a new form. Where such insurance coverage is available, the American maritime industry will face inflated premiums that account for the uniquely pernicious risk of punitive damages. Thus, the American maritime industry will pay these costs one way or

another, even in that subset of cases in which insurance coverage is available and effective. There is no reason to upset the settled insurance expectations that reflect the longstanding balance Congress struck in the Jones Act between the interests of shipowners and the rights of injured seafarers.

These insidious inefficiencies act as a drag on not only the maritime industry, but the economy as a whole. The American maritime industry is massive. Its approximately 40,000 domestic vessels move almost a billion tons of cargo annually. American Maritime Partnership, Frequently Asked Questions, https://www.americanmaritimepartnership.com/about/faq/.

If substantial punitive damages can now result from the generic common-law duty to provide a seaworthy vessel, virtually any American maritime operator is at risk of significant (and potentially uninsurable) liability—far beyond any amount necessary to make whole an injured plaintiff. This will add significant costs to maritime shipping, and these costs will inevitably be passed on to businesses transporting their goods by sea as well as the ultimate consumers. In some instances, of course, these new substantial costs could cause certain maritime companies to cease operations entirely.

The bottom line is that maritime transportation—which historically has been the least expensive and most efficient means of shipping goods, see, *e.g.*, Dubner & Pastorius, *On the Ninth Circuit's New Definition of Piracy: Japanese Whalers v. the Sea Shepherd-Who Are the Real "Pirates" (i.e. Plunderers)?*, 45 J. Mar. L. & Com. 415, 418 (2014)—would become much more expensive. Whether businesses will pay the inevitably higher rates for maritime shipping or turn to less efficient and more costly modes of transportation, the result is the same: higher shipping costs that inflate prices on goods for everyone. These reverberating effects

will necessarily be felt by businesses throughout the economy. At a minimum, the Court should be cognizant of these drastic costs when it acts as a common-law court addressing the punitive damages implications of claims like unseaworthiness.

E. Exacerbating all these problems is that the fallout from allowing punitive damages for unseaworthiness claims will be limited largely to the *American* maritime industry. After all, "[n]oncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries." *Baker*, 554 U.S. at 497; see also Gotanda, *Punitive Damages: A Comparative Analysis*, 42 Colum. J. Transnat'l L. 391, 396 n.24 (2004) (listing many countries from around the world as being among "the civil law countries that permit recovery of only compensatory damages in private actions").

Accordingly, permitting punitive damages would place the American maritime industry at a competitive disadvantage, because much of its international competition will not have to bear that particularly onerous cost. The result is the exact opposite of what the Framers intended—not the "protection" of American maritime commerce, but a step that imperils it. *Kirby*, 543 U.S. at 25.

II. CONGRESS'S CONSIDERED JUDGMENT IN THE JONES ACT WOULD BE EVISCERATED IF PUNITIVE DAMAGES WERE ALLOWED FOR UNSEAWORTHINESS CLAIMS.

Just like in *Miles*, this Court should "restore a uniform rule applicable to all actions" for the same injury to a seaman, "whether under * * * the Jones Act[] or general maritime law." 498 U.S. at 33. The Jones Act does not allow punitive damages for maritime personal injury claims, as petitioner correctly explains. See Pet. Br. 17-19. And a Jones Act claim overlaps with a common-law unseaworthiness claim. See Pet. Br. 19-21.

So in addition to thwarting the Framers' goals in vesting the federal courts with maritime jurisdiction, awarding punitive damages for unseaworthiness would also defy Congress's expressed judgment on this question in the Jones Act.

A. "Congress's prerogative to balance opposing interests and its institutional competence to do so * * * [merits] deference to its policy determinations." *Salazar* v. *Buono*, 559 U.S. 700, 717 (2010) (plurality op.); see *Patsy* v. *Bd. of Regents of State of Fla.*, 457 U.S. 496, 513 (1982) ("The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable."). The Court has honored this "fundamental principle[]" in the maritime context. *Miles*, 498 U.S. at 27.

The Jones Act and unseaworthiness claims have overlapping remedies. This Court made that clear shortly after the Jones Act's passage, when it explained that this statute created an "alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness." *Pac. S.S. Co.* v. *Peterson*, 278 U.S. 130, 138 (1928). In other words, when a seaman's injuries are caused by conduct covered by an unseaworthiness claim or the Jones Act, "there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong." *Ibid.*

In *Miles*, the Court noted the "extensive[]" legislation on maritime law and acknowledged that "Congress retains superior authority in these matters." 498 U.S. at 27. It follows, the Court explained, that "an admiralty court should look primarily to these legislative enactments for policy guidance." *Ibid.* Courts must "keep strictly within the limits imposed by Congress" and be "vigilant not to overstep the well-considered boundaries imposed by federal legislation." *Ibid.*

"Cognizant of the constitutional relationship between the courts and Congress," *Miles* declined to "create, under our admiralty powers, a remedy that * * * goes well beyond the limits of Congress' ordered system of recovery for seamen's injury and death." *Id.* at 36-37. Instead, the Court "act[ed] in accordance with the uniform plan of maritime tort law Congress created in * * * the Jones Act," and it held that "[b]ecause [a seaman's] estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law." *Id.* at 36.

That reasoning mandates reversal of the Ninth Circuit's decision here. As *Miles* recognized, Congress has legislated "extensively" in the area of maritime law. *Id.* at 27. The most important of these enactments, the Jones Act, sought to "establish[] a uniform system of seamen's tort law." *Id.* at 29. That statute specifically addresses the same "wrongful invasion of [a seaman's] primary right of bodily safety" that the common-law unseaworthiness cause of action also protects. *Peterson*, 278 U.S. at 138. Exercising its legislative power to weigh the costs and benefits of various remedies, Congress chose to disallow punitive damages for that type of legal wrong. See Pet. Br. 15-21. *Miles* thus controls this case. Translated to this context, "[b]ecause [a seaman's] estate cannot recover [punitive damages] under the Jones Act, it cannot do so under general maritime law." *Miles*, 498 U.S. at 36.

Permitting punitive damages for unseaworthiness claims would severely undermine Congress's statutory mandate on this issue. This Court's "transformation of the shipowner's duty to provide a seaworthy ship into an absolute duty"—to which strict liability applies—has resulted in "unseaworthiness" displacing the Jones Act as "the principal vehicle for recovery by seamen for injury or death." *Moragne* v. *States Marine Lines, Inc.*,

398 U.S. 375, 399 (1970). Awarding punitive damages for these ubiquitous unseaworthiness claims would thus drown out Congress's considered judgment in disallowing that exact remedy for this type of conduct. Plaintiffs would not even have to go out of their way to circumvent the congressional mandate. They would merely do as they do now—file a common-law unseaworthiness claim in lieu of or alongside a Jones Act claim.

Congress's determination about how to balance the competing interests involved here cannot be so easily thwarted by a court-created cause of action. Rather, when the will of the legislature and the common law clash, it is the common law that must yield: "[i]t would be inconsistent with [this Court's] place in the constitutional scheme were [it] to sanction more expansive remedies in a judicially created cause of action." *Miles*, 498 U.S. at 32.

B. *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404 (2009), changes none of this. As petitioner explained, the maintenance-and-cure context of that case renders it inapplicable in this unseaworthiness setting. See Pet. Br. 21-26.

The maintenance-and-cure cause of action differs from the unseaworthiness cause of action in several key respects. The most important here is that the maintenance-and-cure claim is *not* an alternative, overlapping remedy to a Jones Act claim—whereas an unseaworthiness claim is an alternative to a Jones Act claim. See *Townsend*, 557 U.S. at 420 ("[T]he Jones Act does not address maintenance and cure or its remedy."). While the Jones Act "created a statutory cause of action for negligence," maintenance-and-cure "concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship." *Id.* at 407-408, 415 (quoting *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001)).

Accordingly, "a seaman's action for maintenance and cure is * * * 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages [under the Jones Act].'" *Id.* at 423 (quoting *Peterson*, 278 U.S. at 138-139) (alteration in original). Stated another way, "both the Jones Act and the unseaworthiness remedies are additional to maintenance and cure: the seaman may have maintenance and cure and also one of the other two." *Id.* at 424 (quoting Gilmore & Black, Law of Admiralty § 6-23 (2d ed. 1975)). So in *Townsend*, there was no tension between that maintenance-and-cure common-law claim and Congress's will expressed in the Jones Act, because maintenance-and-cure compensates seamen for a legal wrong that falls outside the remedial scope of the Jones Act.

But here, the court of appeals' treatment of the unseaworthiness common-law claim puts it in direct conflict with the Jones Act—just as in *Miles*. This case concerns the available remedies for unseaworthiness claims, which cover the same "single wrongful invasion of [a seaman's] primary right of bodily safety" and "legal wrong" as the Jones Act. *Peterson*, 278 U.S. at 138. Furthermore, because of the limited scope of maintenance-and-cure claims, *Townsend*'s allowance of punitive damages for such claims presents much less of a threat to maritime commerce than punitive damages for the broader and more lucrative unseaworthiness claims at issue here. Thus, *Miles*, not *Townsend*, controls the outcome here. And it mandates reversal of the Ninth Circuit's decision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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January 2019

No. 18-266

In The Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CLAIMANT SEEKING RECOVERY FOR WRONGFUL DEATH OF CREWMEMBER AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Claimant Seeking Recovery for Wrongful Death of Crewmember, Maren Miller, has a pending claim under the general-maritime-law, unseaworthiness doctrine arising from the wrongful death of a crewmember killed in the service of his ship. *Amicus* seeks punitive damages in connection with that claim, alleging that the crewmember's death wrongfully resulted from the vessel owner's reckless and callous disregard for the vessel's safety.

Although the question presented addresses the availability of punitive damages to a non-fatal-injury claimant, *see* Pet. Br. i; Resp. Br. i, petitioner relies principally on cases decided in the wrongful-death context, in which unique historical considerations suggest some limitations that are irrelevant in the non-fatal-injury context. This Court may therefore resolve the question presented based on the absence of non-fatal-injury authority supporting the categorical ban on punitive damages that petitioner seeks.

If the Court does discuss historical considerations unique to wrongful death, however, *amicus* contends that those considerations are not determinative of the availability of punitive damages to wrongful-death claimants under the general maritime law. Because

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[1] The parties have granted blanket consent to the filing of *amicus* briefs. Pursuant to Rule 37.6, *amicus* confirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* or her counsel made a monetary contribution intended to fund the preparation or submission of this brief.

the parties have not fully briefed this distinct issue, *amicus* seeks to provide this Court with a broader understanding of why punitive damages are available whenever unseaworthiness claims arise from a vessel owner's sufficiently egregious conduct—not only when a crewmember seeks to recover for his or her own non-fatal injuries, but also when a fatally injured crewmember's surviving family members seek to recover for the crewmember's death.

The ability of all unseaworthiness claimants to seek punitive damages not only facilitates punishment of egregious maritime practices, but also incentivizes vessel owners to keep safe the "wards of the admiralty." *Harden v. Gordon*, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (Story, J.). *Amicus* therefore urges this Court to reaffirm that punitive damages have longstanding roots in maritime law as a general tort remedy available in unseaworthiness actions whenever a defendant's misconduct satisfies the rigorous standard for awarding such damages. That result should not turn on whether the misconduct caused injury or death.

SUMMARY OF ARGUMENT

Because the question presented concerns the availability of punitive damages for an unseaworthiness claim alleging personal injury, Pet. Br. i; Resp. Br. i, this Court need not resolve whether punitive damages likewise would be available for an

unseaworthiness claim arising in the distinct context of a crewmember's wrongful death. If, however, this Court discusses that issue, it should confirm that a plaintiff in a general-maritime-law suit based on the death of a crewmember may recover punitive damages in an appropriate case that satisfies the rigorous standard for such an award.

Two independent reasons support this result. First, punitive damages are an available remedy under the Jones Act, a non-determinative reference point this Court has considered when addressing the scope of damages available to crewmembers under the general maritime law for claims that mirror causes of action previously created by Congress. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-33 (1990); *see also Atlantic Sounding v. Townsend*, 557 U.S. 404, 415-24 & n.24 (2009). Although petitioner flatly asserts that the Jones Act does not permit punitive-damages awards, Pet. Br. 15, the Act's enactment history refutes that assertion, as does the Act's role as a remedial statute intended to maximize and safeguard the interests of the wards of the admiralty.

Regardless, this Court may look beyond the Jones Act because the remedies it affords are not always determinative of remedies under the general maritime law. *See Townsend*, 557 U.S. at 424 n.12. And in the context of wrongful death, a second basis for allowing punitive damages exists, drawing on their long history of availability under the state statutes that governed wrongful-death claims prior to the Jones Act. While this Court concluded in *Miles* that the history of

wrongful-death claims did not support allowing compensatory damages for nonpecuniary losses, 498 U.S. at 32-33, the record for punitive damages is different. Therefore, if the Court chooses to discuss whether punitive damages would be an available remedy for an unseaworthiness claim arising from a crewmember's death, it should hold that such damages are recoverable in appropriate cases when a vessel owner's conduct warrants such an award.

ARGUMENT

I. PUNITIVE DAMAGES ARE AN AVAILABLE REMEDY FOR UNSEAWORTHINESS CLAIMS INVOLVING WILLFUL AND WANTON MISCONDUCT, EVEN IN CASES ARISING FROM A CREWMEMBER'S DEATH.

This Court should hold that punitive damages may be recovered in connection with unseaworthiness claims. The availability of such damages should turn on the willful and wanton nature of the vessel owner's conduct, not on whether the conduct injures or kills the crewmember. Two factors bolster this result—the availability of punitive damages under the Jones Act, and the long history, prior to the Jones Act, of state statutes' authorizing punitive damages in wrongful-death cases.

A. Punitive Damages Are Available Under The Jones Act.

For general-maritime-law claims that mirror a cause of action previously authorized by Congress, this Court has held that the types of damages available to plaintiffs should be consistent with the damages available under the Jones Act. *See Miles*, 498 U.S. at 32-33 (evaluating the availability of loss-of-society damages for a wrongful-death, unseaworthiness claim in light of remedies under the Jones Act); *see also* Resp. Br. 30-32. And the enactment history and remedial purpose of the Jones Act refutes petitioner's claim that it does not authorize recovery of punitive damages. *See* Pet. Br. 15. To the contrary, the Jones Act's incorporation of the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60, confirms the availability of such damages under the Act. *See* Injured Crewmembers Amicus Br. 5-28. Moreover, nothing in the Act demonstrates an intent to strip crewmembers of their longstanding right under maritime jurisprudence to recover punitive damages for unseaworthiness claims.

This Court considered Jones Act remedies when assessing the damages sought in both *Miles* and *Townsend*. In *Miles*, this Court considered the claim of a crewmember's mother under the general maritime law for "loss of society" damages after a fellow crewmember murdered her son. 498 U.S. at 21-22. As no general-maritime-law claim for wrongful death existed prior to the Jones Act, this Court reasoned that its own subsequent recognition of that claim should not afford remedies greater than the cause of action defined in the

preexisting statute. *Id.* at 23, 31-33. Because this Court concluded that loss-of-society damages were not permitted in wrongful-death cases under the Jones Act, it held, in turn, that damages for loss of society could not be recovered in connection with a general-maritime-law claim for wrongful death. *Id.* at 32-33.[2]

This Court in *Miles* did not address punitive damages, and it has never held that punitive damages are unavailable under the Jones Act. *See Townsend*, 557 U.S. at 424 n.12. This Court did address the issue of punitive damages in *Townsend*, however, assessing the availability of that remedy under general maritime law in the context of claims for failure to provide maintenance and cure. *See id.* at 409-14. In that context, this Court allowed punitive damages because, "[u]nlike the situation presented in *Miles*, both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act." *Id.* at 420. Indeed, after looking at the history of actions in general maritime law, this Court concluded that "prior to enactment of the Jones Act in 1920, 'maritime jurisprudence was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen.'" *Id.* at 412 (quoting David W. Robertson, *Punitive*

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[2] Because there was no general-maritime-law cause of action for wrongful death prior to the enactment of the Jones Act in 1920, *see Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393-94 (1970), there consequently was no pre-1920 general-maritime-law precedent awarding loss-of-society damages in connection with crewmembers' deaths.

Damages in American Maritime Law, 28 J. MAR. L. & COMM. 73, 115 (1997)).

Although the Court in *Townsend* did not decide whether punitive damages can be recovered under the Jones Act, 557 U.S. at 424 n.12, the historical availability of punitive damages in maritime jurisprudence, along with the enactment history of the Jones Act itself, confirms that punitive damages are recoverable in connection with Jones Act claims. As the Injured Crewmembers Amicus Brief (at 5-28) documents, the Jones Act incorporated the rights and remedies previously available to railway workers at common law because (i) FELA preserved those rights and (ii) the Jones Act, in turn, incorporated FELA's rights and remedies. *See* Merchant Marine Act, ch. 250, § 33, 41 Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. § 30104); *see also Panama R.R. Co. v. Johnson*, 264 U.S. 375, 391-92 (1924) (recognizing incorporation of FELA and its amendments). Those rights included the ability at common law to recover punitive damages for egregious misconduct by railroad employers. *See* Injured Crewmembers Amicus Br. 10-13. Moreover, FELA's purpose was not merely to incorporate but also to *expand* railway workers' rights and remedies while leaving in place all previously available forms of recovery. *Id.* at 14-18; *see also* S. Rep. No. 61-432 (1910), *reprinted in* 45 Cong. Rec. 4040, 4044 (1910).

One of FELA's expansions was the creation of a cause of action for wrongful death that did not previously exist at common law. *See* 45 U.S.C. § 51. Yet, Congress did not differentiate remedies for the newly

created wrongful-death claim from remedies for injury-related claims that the common law previously recognized. Congress stated solely that railroads would be "liable in damages" for both. *See id.*[3] And those "damages" would have encompassed the punitive damages for injury claims that were previously available at common law, which FELA preserved and, through 45 U.S.C. § 51, made uniformly applicable to injury and wrongful-death claims. *See* Injured Crewmembers Amicus Br. 10-18 (discussing, *inter alia*, S. Rep. No. 61-432 (1910)).

It is implausible, therefore, to construe FELA, a remedial enactment designed to promote railroad safety and protect railway workers' rights, as somehow implicitly abrogating the common-law availability of punitive damages. *Id.* at 14-18; *cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488-89 (2008) (rejecting

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[3] The "liable in damages" language states in full that "[e]very common carrier by railroad" in interstate commerce

> shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51.

argument that the Clean Water Act, a statute protective of water rights, was meant to overturn, "*sub silentio*," oil companies' common-law duties and exposure for punitive damages in appropriate cases). And as punitive damages are available under FELA, so too must they be available under the Jones Act. *See Panama*, 264 U.S. at 391-92.

Although this Court in *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59 (1913), concluded that a FELA wrongful-death claim affords only pecuniary damages, thereby precluding an award of loss-of-society damages, *id.* at 71, that decision did not address the availability of punitive damages, which are distinct from nonpecuniary damages for loss of society. *See infra* Part II. And the availability of punitive damages under FELA's "liability in damages" language, which applies equally to injury and death claims, 45 U.S.C. § 51, establishes, in turn, the availability of punitive damages for both injury and wrongful-death claims under the Jones Act. *See* 41 Stat. 1007.[4]

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[4] This Court should reject the flawed contention of petitioner (at 28-29) and some of its *amici* that it would be anomalous to allow punitive damages for a vessel owner's misconduct that results in injury, given that those damages are unavailable when misconduct produces the more severe consequence of death. That argument rests on the false premise that punitive damages are not allowed in wrongful-death cases. The enactment histories and purposes of both FELA and the Jones Act, as discussed, refute that premise. *See supra* at 5-9. Regardless, even assuming the Jones Act does not affirmatively authorize punitive damages, it certainly does not clearly abrogate the common-law availability of punitive damages for general-maritime-law injury claims, which this Court has recognized. *See, e.g., Townsend*, 557 U.S. at

Moreover, the Jones Act, while incorporating the rights and remedies available under FELA, does not limit its protections to those available under FELA. This Court has recognized that crewmembers and their families have rights beyond those available to railway workers. *See, e.g.*, *Townsend*, 557 U.S. at 424 (authorizing punitive damages awards for "the willful and wanton disregard of the maintenance and cure obligation"—an obligation that does not exist in the railroad context); *see also* Injured Crewmembers Amicus Br. 29-30 (discussing additional situations in which crewmembers' rights exceed those available to railway workers under FELA). The availability of punitive damages under the Jones Act, in conjunction with the fact that maritime jurisprudence, prior to the Jones Act, "was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen," *Townsend*, 557 U.S. at 412, favors authorizing punitive damages for unseaworthiness claims under general maritime law, whether the claim is one arising from a personal injury or death.

415-18 (explaining why, as to maintenance-and-cure claims, "the Jones Act does not provide the punitive damages bar that petitioners seek"); *see also* Resp. Br. 32-42; Injured Crewmembers Amicus Br. 28. The most appropriate way to avoid an anomalous result would be to recognize the availability of punitive damages when a vessel owner's willful and wanton misconduct causes injury or death. That approach would enable punitive damages to fulfill their dual punishment and deterrent purposes in the context—death—where such damages are needed most.

B. Allowing Recovery of Punitive Damages for Unseaworthiness Claims Would Be Consistent With The Long History of Authorizing Such Damages Under State Statutes That Governed Claims for Deaths On The Water Prior To The Jones Act.

Although the history of wrongful-death actions under the general maritime law is not as unbroken as the history of the maintenance-and-cure action, there is nonetheless a long history—prior to the Jones Act—of *state* statutes affording both a cause of action and a remedy for wrongful deaths. Those state-created causes of action and remedies were available to claimants seeking recovery for deaths on the water, even at a time when no such cause of action existed under general maritime law. *See, e.g.*, *The Hamilton*, 207 U.S. 398, 405-07 (1907) (citing, *inter alia*, *Workman v. City of N.Y.*, 179 U.S. 552, 562-63 (1900) ("[I]t has been decided that although at the time of the adoption of the Constitution, in courts of admiralty as in courts of common law, a cause of action for a personal injury abated by the death of the injured party, nevertheless, when, by a state statute, a right of recovery in such a case was conferred, the admiralty courts would recognize and administer the appropriate relief.")). And a number of states authorized recovery of punitive damages, when appropriate, in connection with wrongful-death claims.

The history of wrongful death in the maritime context underscores the important role state statutes

played in the late nineteenth and early twentieth centuries in protecting the interests of the wards of the admiralty. In 1886, this Court held that no action for wrongful death was available under the general maritime law. *The Harrisburg*, 119 U.S. 99 (1886). And that remained the law until *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *Moragne* overruled *The Harrisburg* and held that—in a legal landscape in which every state had a wrongful-death statute and Congress had enacted two statutes (DOHSA and the Jones Act) that provided for wrongful-death actions by crewmembers and others on the high seas—the general maritime law also should provide recovery for wrongful death. *Id.* at 390.

Even when recovery for wrongful death was not available under general maritime law, however, there was often an alternative source of recovery for wrongful death on the water. "At the time Congress passed the Jones Act and DOHSA, federal courts uniformly applied state wrongful-death statutes for deaths occurring in state territorial waters." *Miles*, 498 U.S. at 23-24 (citing 41 Stat. 537, 1007); *see also The Tungus v. Skovgaard*, 358 U.S. 588, 591 (1959) (referring to the "long-settled doctrine" that admiralty courts would hear such cases in accordance with the recovery afforded under state law). In fact, recovery under state wrongful-death statutes was available even after *The Harrisburg* held that recovery was not available under general maritime law.[5] *See, e.g., The Hamilton*, 207 U.S.

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[5] The available state statutes may not have provided recovery for wrongful death based on strict-liability unseaworthiness,

at 405-06. And, prior to the enactment of DOHSA, recovery grounded in state law even extended beyond territorial waters. *Id.*[6]

At the time the Jones Act was enacted, all 48 then-existing states had wrongful-death statutes. Brian C. Colomb, McBride v. Estis Well Service, LLC: *The Seaman's Case for Punitive Damages Under His Unseaworthiness Claim and How the U.S. Fifth Circuit Got It Wrong, Again*, 14 LOY. MAR. L.J. 205, 237 (2015) ("By the end of the nineteenth century, all states had adopted some form of death damages: *wrongful death*, *survival*, or both."). And a significant number of those states—at least 15 of 48—had statutes (or constitutional provisions) in place that allowed for the recovery of punitive or exemplary damages in wrongful-death cases.[7] The Nevada statute, for example, provided that

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see Moragne, 398 U.S. at 377, instead requiring a showing of negligence to establish liability. *See, e.g., Louisville & N.R. Co. v. Kelly's Adm'x*, 38 S.W. 852, 853 (Ky. 1897) (discussing Kentucky's statute allowing recovery for death resulting "from an injury inflicted by negligence or wrongful acts"). However, any case in which punitive damages are appropriate would involve, at the least, negligence. *See, e.g., Baker*, 554 U.S. at 492-93 (discussing the prevailing rule in American courts requiring heightened degrees of culpability for an award of punitive damages); David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, 70 LA. L. REV. 463, 464 (2010) ("Punitive damages aim at punishing reprehensible behavior, teaching the perpetrator not to do it again, and admonishing others never to do it").

[6] State wrongful-death statutes still apply to deaths of non-seafarers within territorial waters. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 216 (1996).

[7] *See infra* at 13-20 (discussing statutes from Alabama, Arkansas, Kentucky, Massachusetts, Mississippi, Missouri,

"[t]he jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just." *Benner v. Truckee River Gen. Elec. Co.*, 193 F. 740, 741 (C.C.D. Nev. 1911); *see also Christensen v. Floriston Pulp & Paper Co.*, 92 P. 210, 216-17 (Nev. 1907) (explaining that the only relevant difference between the Nevada and California wrongful-death statutes was that the Nevada statute permitted recovery of punitive damages).

The New Mexico statute was more specific on how a jury should determine the amount of "fair and just" damages awarded, but it was just as clear that exemplary damages were permitted. Like the Nevada statute, it states that "the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just," but it then continues, instructing the jury to "tak[e] into consideration the pecuniary injury or injuries resulting from such death to the surviving party . . . and also hav[e] regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default." *Stang v. Hertz Corp.*, 463 P.2d 45, 49 (N.M. App.), *aff'd*, 467 P.2d 14 (N.M. 1969); *see also Folz v. State*, 797 P.2d 246, 255-56 (N.M. 1990) (explaining that, in 1891, New Mexico supplemented its original 1882 wrongful-death statute to add an express provision allowing for punitive damages).

Montana, Nevada, New Mexico, South Carolina, Tennessee, Virginia, Washington, and West Virginia, as well as the Texas constitution).

Similarly, the South Carolina statute provided that "the jury may give such damages, including exemplary damages, where such wrongful act, neglect or default was the result of recklessness, willfulness or malice, as they may think proportional to the injury." *Brickman v. S. Ry.*, 54 S.E. 553, 557 (S.C. 1906). Washington also included in its statute the direction that "pecuniary and exemplary" damages were permissible, with its supreme court holding that exemplary damages were allowed "in cases of injuries caused by moral or legal wrong amounting to willfulness." *Klepsch v. Donald*, 30 P. 991, 994 (Wash. 1892).

Texas enacted a wrongful-death statute in 1860, drawing on English law. *Travelers Indem. Co. of Ill. v. Fuller*, 892 S.W.2d 848, 851 (Tex. 1995). But the Texas statute left an "ambiguity" regarding the availability of punitive damages to the decedent's heirs. *See id.* Rather than amend the statute, Texas resolved the ambiguity by amending the state constitution in 1869 "to allow for punitive damages in favor of the wrongful death beneficiaries." *Id.*; *see also* TEX. CONST. art. 16, § 26 note (Vernon 1993) (amendment added in 1869).

Other states had wrongful-death statutes that did not include the words "exemplary" or "punitive" in their text, but state courts construed them to provide for exclusively punitive damages based on the fault of the defendant, not the loss suffered by the plaintiff. In Alabama, for example, the relevant statute was the

"Homicide Act."[8] *See Parker v. Fies & Sons*, 10 So. 2d 13, 15 (Ala. 1942). The "purpose of the [Homicide Act] was not to compensate or recompense any one, but to mete civil punishment to the wrongdoer, and thereby prevent homicides," with the amount of damages left entirely in the discretion of the jury. *Kennedy v. Davis*, 55 So. 104, 105 (Ala. 1911). Similarly, the Massachusetts wrongful-death act was solely a punitive, rather than compensatory, provision. *Boott Mills v. Bos. & M.R.R.*, 106 N.E. 680 (Mass. 1914). West Virginia also had a statute that lacked any reference to punitive or exemplary damages per se, but that state's supreme court nonetheless held that juries had authority to award "fair and just" damages, subject to a statutory cap, that were "exemplary and punitive, as well as compensatory," and "[a]ny damages imposed in such cases are a forfeiture for the wrong done." *Turner v. Norfolk & W.R. Co.*, 22 S.E. 83, 87 (W. Va. 1895).

The Virginia Supreme Court determined that the expansive wording of its wrongful-death statute authorized all forms of damages, including punitive damages. *See Matthews v. Warner's Adm'r*, 70 Va. (29 Gratt.) 570, 576-77 (1877). The Virginia statute "declared that 'the jury in any such action may award such damages *as to it may seem fair and just*,'" the court noted, with "no words of limitation." *Id.* at 576-77.

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[8] Although called the "Homicide Act," the statute covered negligence as well as intentional killing. *Buckalew v. Tenn. Coal, Iron & R.R. Co.*, 20 So. 606, 609 (Ala. 1896) (noting that the Homicide Act authorizes recovery of damages for death caused by "the wrongful act, omission or negligence of any person").

The Mississippi Supreme Court undertook a similar analysis with its statute, which allowed "such damages as the jury may determine to be just, taking into consideration all of the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit." *Id.* This expansive language, the Mississippi Supreme Court held, was "broad enough to include damages of every kind and nature which might have been awarded to the decedent had he lived and brought suit, and which could be given to those persons who could bring the suit after his death." *Id.* Thus, a wrongful-death plaintiff could recover punitive damages under the statute. *Id.*

Incorporation of the phrase "aggravating circumstances" also was viewed as signaling an expansion of the types of available damages. As the Missouri Supreme Court observed, "[e]arly cases interpreted the authorization for damages based on aggravating circumstances to allow exemplary or punitive damages." *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 466 (Mo. 1995) (citing *Parsons v. Mo. Pac. Ry. Co.*, 6 S.W. 464, 468 (Mo. 1888), *Nichols v. Winfrey*, 79 Mo. 544 (1883), and *Goode v. Cent. Coal & Coke Co.*, 151 S.W. 508, 511 (Mo. App. 1912)); *see also Calcaterr v. Iovaldi*, 100 S.W. 675, 677 (Mo. 1906) (determining that exemplary damages are appropriate in cases of "wantonness" or "gross negligence").[9]

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[9] In addition to allowing punitive damages under the general wrongful-death statute, Missouri courts also allowed punitive damages under a statute governing claims for deaths caused by

The absence of a statutory limitation on the type of available damages was sufficient, in other states, to indicate that a general right to punitive damages had been extended to cases in which an injury resulted in death. In Kentucky, the state constitution stated: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful acts, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same." *Louisville & N.R. Co. v. Kelly's Adm'x*, 38 S.W. 852, 853 (Ky. 1897). The Kentucky Supreme Court held that this language was "intended to extend the common-law right of action to recover both compensatory and exemplary damages for injuries not resulting in death to cases in which death ensued." *Id.* at 854.

Other state courts were similarly unconstrained by the absence of an express authorization of punitive damages in their wrongful-death statutes. Thus, even though the Tennessee statute made no mention of punitive damages per se, the Tennessee Supreme Court unhesitatingly held that, "[o]ur statute provides that the right of action which a person, who dies from injuries received, would have had, had death not ensued, shall pass to his personal representative," and those rights included the right to exemplary damages. *Haley v. Mobile & O. R. Co.*, 66 Tenn. 239, 242 (1874).

The Montana Supreme Court looked to a general civil-damages statute to inform its interpretation of its

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railroads. *Faulk v. Kansas City Rys. Co.*, 247 S.W. 253, 253 (Mo. Ct. App. 1922).

wrongful-death act, which provided only that "such damages may be given as under all the circumstances of the case may be just." *Olsen v. Mont. Ore Purchasing Co.*, 89 P. 731, 734 (Mont. 1907). The state civil code, by contrast, expressly authorized exemplary or punitive damages, stating that "[i]n any action for a breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." *Id.* The court found "no reason" that the general provision regarding punitive damages should not also apply to wrongful-death actions. *Id.*

Finally, the Arkansas Supreme Court approved punitive-damages awards even though Arkansas's wrongful-death statute did not explicitly authorize such awards. The statute did, however, include language explicitly authorizing damages for loss of society and mental anguish, as allowing "such damages as will be fair and just compensation for the pecuniary injuries, including a spouse's loss of the services and companionship of a deceased spouse and/or mental anguish resulting from such death, to the surviving spouse and next of kin of such deceased person." *Vickery v. Ballentine*, 732 S.W.2d 160, 161 (Ark. 1987). Although this language did not speak to the availability of punitive damages, the Arkansas Supreme Court nevertheless approved such awards in early cases. *See Chi. Mill & Lumber Co. v. Bryeans*, 209 S.W. 69 (Ark.

1919); *St. Louis, Iron Mountain & S. Ry. v. Roberson*, 146 S.W. 482 (Ark. 1912).

As this survey shows, the recovery of punitive damages under state wrongful-death statutes was not consistent across all states, but a significant number of states did approve of the award of such damages. Punitive damages would, therefore, have been available to many plaintiffs bringing suit under state wrongful-death laws for deaths on the water, even prior to the Jones Act's enactment. *See, e.g.*, *The Hamilton*, 207 U.S. at 407; *Workman*, 179 U.S. at 562-63. And federal courts, including this Court, were aware of that fact. *See, e.g.*, *Seaboard Airline R.R. v. Koennecke*, 239 U.S. 352, 354 (1915) (acknowledging that the South Carolina wrongful-death statute under which plaintiff could have brought suit allowed recovery of exemplary damages); *Benner*, 193 F. at 741 (quoting Nevada statute that specifies exemplary damages may be awarded). This history, in conjunction with the fact that, "prior to enactment of the Jones Act in 1920, 'maritime jurisprudence was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen,'" *Townsend*, 557 U.S. at 412, militates in favor of authorizing recovery of punitive damages, when appropriate, for unseaworthiness claims, even when a crewmember's injury results in death.

II. ANY LIMITATIONS ON RECOVERY OF "NONPECUNIARY" DAMAGES FOR WRONGFUL DEATHS DO NOT APPLY TO PUNITIVE DAMAGES.

Some courts mistakenly have expanded the holding in *Miles*, 498 U.S. at 32-33, that one type of "nonpecuniary" damages—loss of society—may not be recovered in a wrongful-death action under the general maritime law as an automatic rejection of punitive damages in maritime cases. *See, e.g.*, *McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 390-91 (5th Cir. 2014) (en banc); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-61 (9th Cir. 1984). That expansion is unwarranted for two reasons. First, it is inaccurate to put punitive damages into the category of "nonpecuniary" damages. Second, whatever label is applied to punitive damages, those damages are categorically different from the damages considered in *Miles* and in the cases on which *Miles* relied.

Punitive damages are not properly classified as "nonpecuniary" damages. And this Court has never characterized punitive damages as "nonpecuniary," distinguishing instead between punitive damages and compensatory damages (which may include both pecuniary and nonpecuniary losses). *See, e.g.*, *Baker*, 554 U.S. at 489; *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Moreover, this Court has described a variety of fines and penalties as "pecuniary punishment." *See, e.g.*, *Austin v. United States*, 509 U.S. 602, 614 n.7 (1993); *Okla. ex rel. W. v. Gulf, C. & S.F.R. Co.*, 220 U.S.

290, 299 (1911); *Keck v. United States*, 172 U.S. 434, 448 (1899).

Nor does the Restatement of Torts endorse classifying punitive damages as "nonpecuniary." Instead, it lists four types of damages: "Compensatory Damages for Nonpecuniary Harm"; "Compensatory Damages for Pecuniary Harm"; "Nominal Damages"; and "Punitive Damages." RESTATEMENT (SECOND) OF TORTS §§ 905-08 (AM. LAW. INST. 1975). Compensatory damages for nonpecuniary harm, which includes damages for bodily harm and for emotional distress, are damages that can be awarded "without proof of pecuniary loss." *Id.* § 905. Punitive damages are damages "other than compensatory or nominal damages." *Id.* § 908; *see also* Robertson, 28 J. MAR. L. & COMM. at 80-81 (explaining that the pecuniary/nonpecuniary distinction is properly applied only to compensatory damages).

The Court in *Miles* based its denial of loss-of-society damages on a determination that the Jones Act allowed recovery of only pecuniary damages. *Miles*, 498 U.S. at 32-33. That interpretation was not based directly on the text of the Jones Act, but on the incorporation in that act of standards drawn from FELA. *Id.* at 32; *see also* Resp. Br. 4. And, previously, this Court had held that FELA allowed only pecuniary damages—a limitation not stated explicitly in FELA's text. *Miles*, 498 U.S. at 32 (citing *Vreeland*, 227 U.S. at 69-71). Instead, to interpret FELA, this Court looked in *Vreeland* to Lord Campbell's Act, the English predecessor to state wrongful-death statutes, as the first statute to permit recovery for wrongful death. 227 U.S.

at 71. As this Court stated, "[t]he word 'pecuniary' did not appear in Lord Campbell's act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage." *Id.* Thus, this Court held that damages for loss of society are not recoverable under FELA. *Id.* at 74.

The distinct issue of punitive damages, however, was not before this Court in either *Vreeland* or *Miles*. In fact, this Court has never addressed the availability of punitive damages under FELA.[10] Indeed, the Court's reference in *Vreeland* to the unavailability of *nonpecuniary* damages in "all those [statutes] which follow" Lord Campbell's Act, *id.* at 271, supports excluding punitive damages from the nonpecuniary category, given that many of those state statutes in fact allowed recovery of punitive damages in connection with wrongful-death claims. *See supra* at 11-20; *see also* Injured Crewmembers Amicus Br. 21-22. This Court's FELA and general maritime-law precedent, therefore, neither establishes that punitive

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[10] Lower courts that mistakenly have relied on *Vreeland* to prohibit awards of punitive damages often cite two other FELA wrongful-death cases decided by this Court that same year, but neither addressed punitive damages. *See Gulf, Colo. & Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 174-76 (1913) (addressing a non-dependent child's claim for compensatory damages); *Am. R.R. Co. v. Didricksen*, 227 U.S. 145, 149-50 (1913) (addressing loss-of-society damages); *see also* Injured Crewmembers Amicus Br. 25-28 (exposing lower courts' flawed reasoning that punitive damages were categorically unavailable under FELA).

damages are nonpecuniary in nature, nor precludes their availability in unseaworthiness claims, whether arising from a crewmember's injury or death.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 28, 2019

No. 18-266

In The

Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF OF THE DREDGING CONTRACTORS OF AMERICA AND COUNCIL FOR DREDGING & MARINE CONSTRUCTION SAFETY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether punitive damages may be awarded to a Jones Act seaman in a personal-injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.

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BRIEF OF THE DREDGING CONTRACTORS OF AMERICA AND COUNCIL FOR DREDGING & MARINE CONSTRUCTION SAFETY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The Dredging Contractors of America ("DCA") represents twenty-eight (28) companies that own and operate hundreds of dredging vessels in and around the oceans and territorial waters of the United States, inland waterways and on the Great Lakes. DCA, a non-profit trade association representing the U.S.-dredging industry and its members, is committed to supporting and protecting America's ports, waterways, wetlands, and beaches. On behalf of its members, DCA works to promote the quality and responsiveness of dredging service delivery in the United States, ensuring that America's ports, waterways, wetlands, and coasts are efficiently constructed and maintained in an environmentally sustainable manner using innovative methods and American ingenuity.

The Council for Dredging and Marine Construction Safety (CDMCS), consisting of twenty-five (25) companies and organizations, is the unified voice for safety in the dredging and marine construction

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

industry. The CDMCS is the leader for raising safety standards in the industry and for promoting a safety-first culture. Its diverse membership supports American maritime infrastructure and the wellbeing of maritime workers, coast-to-coast. The mission of CDMCS is to raise the industry standard on safety to protect workers, resolve safety disputes, and build a safety-first culture.

DCA, CDMCS and their member companies and organizations have a strong interest in the resolution of this case. As maritime industry owners and operators, each is subject to the Jones Act and to general maritime law doctrines such as unseaworthiness. *Amici* file this brief to explain why the issue of punitive damages attached to a claim of unseaworthiness is exceptionally important to the dredging industry.

BACKGROUND

A. The U.S. Dredging Industry's Importance to National and Economic Security

American dredging companies are vital to the U.S. economy by ensuring the nation's harbors and channels are maintained at the appropriate depth and properly widened to accommodate the substantial increase in the size of vessels visiting U.S. ports. Seaport cargo activity supports the employment of more than 23 million people in the United States – an increase of 9.8 million jobs since 2007.[3] Seaport-related jobs also

[3] Martin Associates, *The 2014 National Economic Impact of the U.S. Coastal Port System* (2014), *available at* http://aapa.files.

provide for $1.2 billion in personal income and local consumption.[3] For every $1 billion exports shipped through U.S. seaports, 15,000 jobs are created. Further, seaport cargo activity accounts for 26 percent of the U.S. economy. U.S. seaports generated nearly $4.6 trillion in total economic activity and more than $321 billion in federal, state and local taxes in 2014.[4] Dredging is critical to the success of waterborne commerce to and from the United States, particularly as a result of the newly expanded Panama Canal. Ships transiting the canal are more than twice the size of the vessels that could transit prior to June of 2015.[5]

In addition to its economic contributions, the maritime industry provides important national security benefits, ships, shipyards, mariners, and other elements of our domestic maritime infrastructure to America's military sealift capacity. Indeed, the U.S.-flag commercial shipping industry provides the U.S. military with a highly effective partner in the

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cms-plus.com/SeminarPresentations/2015Seminars/2015Spring/US%20Coastal%20Ports%20Impact%20Report%202014%20methodology%20-%20Martin%20Associates%204-21-2015.pdf.

[3] *Id.*

[4] *Id.*

[5] Owen Braley & William P. Doyle, *The Panama Canal Expansion Proves Real and Dredging Must Continue*, Maritime Logistics Professional (July 17, 2017), *available at* https://www.maritimeprofessional.com/blogs/post/the-panama-canal-expansion-proves-real-and-dredging-must-15220. (More than half of the containerships are 13,000-plus TEU vessels – neo-Panamax ships. These ships are coming from Asia to the U.S. East and Gulf Coasts. Prior to the expansion, the old locks could only fit containerships up to approximately 5,000 TEUs).

provision of military sealift services around the globe by delivering cost-effective service at a high level of performance quality and dependability.[6]

The commercial U.S.-flag maritime industry is the backbone to our nation's war fighting and emergency response mobility. Throughout our nation's history, in peacetime and in war, the U.S.-flag commercial shipping industry has not had to factor into its operations the impact of punitive damages under the Jones Act or personal injury claims within the suite of general maritime laws. This is important because our country needs as many private sector commercial domestic maritime partners as possible in order to sustain our war fighting and emergency response capabilities.

Allowing punitive damages for an injury based on an unseaworthiness claim may stifle new companies from entering the commercial maritime industry because the risks associated with punitive damage awards are too high. Further, commercial maritime operators may be driven out of the industry because the insurance premiums are too expensive, or they simply may not be able to secure insurance policies. Punitive damage awards could also put existing companies out of business. Therefore, this Court should not allow punitive damage remedies to attach to Jones Act personal injury claims or unseaworthiness claims because doing

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[6] Navy League of the United States, *America's Maritime Industry: The foundation of American seapower* (May 3, 2012), *available at* https://www.navyleague.org/file/programs/Maritime-Policy-Statement-Report.pdf.

so could pose a significant risk to our national and economic security.

B. U.S. Dredging Industry and Economic Benefits

The U.S.-flag dredging industry is part of the more than 40,000 American vessels built in American shipyards, crewed by American mariners, and owned by American companies that operate in our domestic waters 24 hours a day, 7 days a week, and 365 days a year. The U.S.-flag maritime industry sustains nearly 650,000 American jobs and generates $29 billion in labor compensation, $11 billion in taxes, and more than $100 billion in annual economic output. Allowing punitive damages could hurt the employment opportunities for U.S. Merchant Mariners (seamen) because companies may find the risks too great to invest in the U.S.-flag commercial shipping industry – and without companies, there are no commercial seafarer jobs.

The American dredging industry is amid a $1.5 billion dredging fleet expansion. In 2017, the U.S.-flagged hopper dredging fleet capacity increased by 34 percent with the addition of two large dredges built for Great Lakes Dredge & Dock Company and Weeks Marine. Thus, new capital construction investment includes four large cutter suction dredges, two large hopper dredges and approximately fifty (50) barges built in shipyards across the United States, including at Eastern Shipbuilding in Panama City, Florida, Conrad Shipyard in Morgan City, Louisiana, and Halimar

Shipyard, also in Morgan City. In addition, Callan Marine is constructing a massive 32-inch hydraulic cutter suction dredge at C&C Marine Shipyard in Belle Chasse, Louisiana. Dutra Group is currently building two 6,000 cubic yard hydraulic dump scows in Corn Island Shipyard in Grandview, Indiana. Weeks Marine is building a 30-inch cutter head suction dredge at C&C Marine Shipyard. Further, Manson Construction has commenced the design phase on a large-scale, self-propelled Glenn Edwards Class hopper dredge, and Cashman Dredging is procuring long-lead time equipment for the construction of two 6,000 cubic yard hopper dredges.

The private sector dredging industry's investment and capital decisions are made on the best available market data and with a level of certainty. Importantly, these investment decisions made by large and small businesses alike have never had to factor in the uncertainty of potential future maritime-related punitive damage awards against the companies.

The inability to anticipate when punitive damages would be assessed in Jones Act plaintiff suits, and the size of those potential punitive damage awards, could cause dredging companies to retain emergency funds to hedge against damage awards – funds they would otherwise invest in capital improvements or use for hiring additional workers. Further, insurance premiums would most certainly increase to keep up with the increased cost of litigating claims where the potential for punitive damages exist. Ultimately, as most dredging projects are funded through contracts with federal,

state and local governments, these costs would have to be passed on to the taxpayer – and that is not fair.

C. The U.S. Dredging Industry is Highly Competitive on Taxpayer Funded Projects

The U.S. dredging industry is highly competitive, with on average, more than fifty (50) different companies being awarded federal work each year and eighty (80) different companies bidding on that work each year. Congress recently acknowledged small businesses are very active in the dredging industry.[7] Congress has appropriated over $6 billion in awarded federal dredging projects over the past five years (fiscal years 2013-2017).[8] Further, states and local governments are contributing their own funds to help complete channel and harbor deepening as well as widening dredging projects. For instance, South Carolina has contributed $300 million of its own money, plus a $50 million loan in order to complete its

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[7] Nearly $2 billion is spent in contracts to small businesses for dredging related activities. Of the 40 companies that dredge for the Corps, 28 are small businesses (*based on fiscal year 2017*). *See* S. Rept. 115-294 – AMERICA'S WATER INFRASTRUCTURE ACT OF 2018.

[8] Total 5-Year Federal Dredging Program Awarded $6,009,875,887: FY17 = $1,288,882,502, FY16 = $1,022,910,102, FY15 = $1,397,740,044, FY14 = $968,244,688, FY13 = $1,332,098,551. *(Data compiled from contract data on FedBizOpps.gov, GovTribe.com, dredging abstracts provided by the U.S. Army Corps of Engineers, and input from U.S. dredging companies).*

Charleston Harbor deepening project.[9] Georgia has contributed nearly $266 million for its Savannah Harbor Expansion Project (SHEP) and its 2019 budget includes $35 million more in taxpayer funds.[10] Pennsylvania is contributing 35 percent or $140 million of the total $400 million for the Delaware River deepening project.[11] Finally, states and counties including in Michigan and Virginia are turning toward tax increment financing (TAF) to help support dredging projects.[12]

In a highly competitive and healthy dredging industry, the companies bidding for projects important to our nation have never had to factor into their dredging bids the potential for future punitive damage awards.

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[9] Emma Dumain, *More money could be coming for Charleston port project*, McClatchy DC (October 29, 2018), *available at* https://www.mcclatchydc.com/news/nation-world/national/regional/the-south/article220782365.html.

[10] Katie Nussbaum, *More funding approved for Savannah harbor*, Savannah Morning News (Savannah Now) (June 26, 2018), *available at* https://www.savannahnow.com/business/20180626/more-funding-approved-for-savannah-harbor-deepening.

[11] Andrew Maykuth, *Delaware River deepening: 30 years and 16 million cubic yards of sand, muck and rock later*, The Philadelphia Inquirer (Philly.com) (December 27, 2018), *available at* http://www.philly.com/news/delaware-river-dredging-deepening-finish-philaport-army-corps-20181227.html.

[12] *See* Governor Rick Snyder, *Bill signed to allow tax increment financing for waterfront improvement projects* (May 10, 2013), *available at* https://www.michigan.gov/snyder/0,4668,7-277-57577_57657-302666--,00.html; *see also* Virginia Association of Counties, *Tax Increment Financing for Dredging Passes House* (February 5, 2018), *available at* http://www.vaco.org/tax-increment-financing-dredging-passes-house/.

If dredging companies become subject to punitive damage claims and awards, then these companies would have to factor into their bid submissions computations that would ultimately have to be passed-on to the taxpayers.

It is Congress that authorizes all federal dredging projects and appropriates the funding. Moreover, it was Congress in 1986 that allowed non-federal sponsors (such as states and local governments) cost sharing authority to help pay for dredging projects.[13] Importantly, Congress has not authorized punitive damage remedies for personal injuries under the Jones Act or a general maritime claim of unseaworthiness. If this Court were to allow punitive damages in these instances, then it would upset the uniform balance in maritime law that dredging companies, and federal and state governments, have relied on for decades when assessing the cost of dredging projects. Punitive damages attached to maritime personal injury claims have been addressed by Congress, it is settled law, and this Court should not disturb the uniform rights and remedies that have provided certainty to the dredging community and the wider commercial maritime industry.

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[13] *See* Water Resources Development Act of 1986, Public Law 99-662, 100 Stat. 4082-4273.

SUMMARY OF ARGUMENT

This Court should reverse the Ninth Circuit's decision and preserve an appropriate scope of relief for unseaworthiness claims. It is likely that allowing punitive damages to attach to an unseaworthiness claim would substantially increase the costs to ship owners through higher damages awards, higher settlements, and potentially higher insurance premiums (if insuring against punitive damages is legal). Simply put, Congress has not passed any laws allowing punitive damage remedies under the Jones Act or for injuries suffered from a breach of the general maritime duty to provide a seaworthy vessel.

ARGUMENT

I. Remedies: Wages, Maintenance and Cure, Unseaworthiness and Jones Act

There is a difference between available remedies pursuant to maritime law. There are remedies available to seamen that derive from the employer and employee relationship. These remedies include payment of wages and the responsibility to provide maintenance and cure. Then, there are tort remedies for personal injuries resulting from negligence while a seaman is in the service of the vessel; and tort remedies for personal injuries resulting from the unseaworthiness of a vessel.

As this Court previously observed, "[t]he unseaworthiness doctrine has become the principal vehicle

for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 399 (1970); *see also Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 208 (1996) (unseaworthiness has "eclipsed ordinary negligence as the primary basis of recovery when a seafarer was injured or killed").

The Merchant Marine Act of 1920, commonly known as the Jones Act, permits a seaman to bring a personal injury or wrongful death action based on negligence. 46 U.S.C. § 30104; *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29 (1990). In 1944, twenty-four (24) years post-enactment of the Jones Act, the Supreme Court confirmed that the duty of the shipowner to supply a vessel and appurtenances adequate for the purposes of ordinary use was not based on negligence principles but was "absolute",[14] i.e., strict liability. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).[15]

Evolving over time, we get to *Miles*, where the Supreme Court addressed the scope of damages recoverable in actions for unseaworthiness. There, this Court

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[14] The United States Supreme Court first indicated that the shipowner's duty to furnish a seaworthy vessel was "absolute" in *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922).

[15] *Mahnich*, 321 U.S. 96, 100 ("[T]he exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances. . . . If the owner is liable for furnishing an unseaworthy appliance, even when he is not negligent, *a fortiori* his obligation is unaffected by the fact that the negligence of the officers of the vessel contributed to its unseaworthiness.").

declared: "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault," i.e., unseaworthiness, "than Congress has allowed in cases of death resulting from negligence," i.e., the Jones Act. 498 U.S. at 32-33. Further, the Court held that the Jones Act "precludes recovery for loss of society" on unseaworthiness claims. *Id.* at 30, 32-33.

Subsequently, in *Atlantic Sounding Co. v. Townsend*, this Court held that punitive damages are available "for the willful and wanton disregard of the maintenance and cure obligation" – a general maritime legal duty requiring a shipowner to provide wages, food, lodging, and medical treatment to a wounded or ill seaman. 557 U.S. 404, 424 (2009). This Court explained that "punitive damages have long been an accepted remedy under general maritime law, and . . . nothing in the Jones Act altered this understanding." *Id.*

The Ninth Circuit in *Batterton v. Dutra* is relying on *Townsend*, finding that because punitive damages are available for general maritime law claims for maintenance and cure, then punitive damages are also available for a claim of unseaworthiness. However, in *McBride v. Estis Well Serv., LLC*, 768 F.3d 382, 391 (5th Cir. 2014), the Fifth Circuit found *Miles* controlling, reasoning that punitive damages are not permitted for personal injury and death claims under the Jones Act, and therefore, punitive damages are likewise not available for unseaworthiness claims.

In summary, this Court has ruled that shipowners are liable for punitive damages if the shipowner *willfully and wantonly* refuses to pay wages and/or provide food, lodging, and medical treatment to a wounded or ill seaman. However, this Court draws a transparent and distinct line separating a shipowner's willful and wonton conduct related to a maintenance and cure action from a personal injury claim based on negligence or unseaworthiness where punitive damage remedies are not allowed.

II. The Ninth Circuit Should Be Reversed Because Congress Did Not Intend Punitive Damage Remedies for Unseaworthiness Claims

In the historical and precedent setting decision, *The Osceola*, 189 U.S. 158, 177 (1903), this Court ruled in the "negative" when asked to decide whether a vessel, its owners or the master could be held responsible for injuries by negligence of the master or other crewmembers. The unanimous decision held, " . . . the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure whether the injuries were received from negligence or accident." *Id.* at 158. *Osceola* did confirm and settle important rights for seamen including when a mariner falls sick or is wounded while in the service of the vessel where the seaman is entitled to maintenance and cure and wages due for the entire voyage. Notably, the *Osceola* decision

clearly barred negligence claims brought by a seaman and instead left that matter for Congress.

It is important that settled maritime rights and remedies should not be undermined by interpreting unseaworthiness radically different than the laws enacted by Congress. Congress did enact legislation addressing negligence post-*Osceola*, providing a comprehensive approach towards remedies for a seaman's injury or death.

In response to *Osceola*, Congress first attempted to legislate protections for seamen by enacting the Act to Promote the Welfare of the American Seaman Act ("The Seamen's Act") in 1915.[16] Here though, this Court soon after determined that Congress did not appropriately legislate language that would allow seamen the right to assert a claim of negligence under the Seamen's Act.[17]

In Congress' second attempt to square *Osceola*'s negligence gap, it enacted the Merchant Marine Act of 1920, i.e., Jones Act.[18] In doing so, Congress borrowed

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[16] Act of March 4, 1915, ch. 153, sec. 20, Pub. L. No. 63-302, 38 Stat. 1164, 1185 (1915). Section 20 of the Seamen's Act provides: "In any suit to recover damages for any injury sustained on board [a] vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

[17] *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372, 384 (1918) (finding the Seamen's Act of 1915 addressed only the Osceola's so-called fellow servant rule, and not negligence).

[18] Act of June 5, 1920, ch. 250, sec. 33, Pub. L. No. 66-261, 41 Stat. 988, 1007 (1920) (codified as 46 U.S.C. app. § 688(a) (2000)).

directly from the Federal Employers Liability Act[19] ("FELA") extending to seamen the same regulatory recovery regime that applies to railway employees for personal injury or death.[20] Seamen could recover pecuniary losses but not for non-pecuniary losses. Importantly, punitive damages were not made available under the Jones Act because Congress incorporated the remedies available under FELA, which do not include punitive damages.

The *Batterton v. Dutra* decision below cannot be reconciled with this Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32-33 (1990), holding that

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It is known as the "Jones Act," in honor of Sen. Wesley L. Jones (R. Washington), its principal sponsor.

[19] Act of April 22, 1908, ch. 149, Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified at 45 U.S.C. §§ 51-60 (2000)), known as FELA.

[20] Section 20, Merchant Marine Act of March 4, 1920 states:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to *railway employees* shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of *railway employees* shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (*emphasis added*).

the estate of a deceased seaman cannot recover loss of society damages in a wrongful death action based on either unseaworthiness or Jones Act negligence.[21] A key component of *Miles'* analysis was reliance upon *Michigan Central Railroad Co. v. Vreeland*,[22] interpreting that FELA's pecuniary loss limitation is incorporated into the Jones Act and therefore "precludes recovery for loss of society," which, like punitive damages, is a non-pecuniary loss.[23] Specifically, this Court wrote, "Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation."[24]

Further, this Court zeroed-in on the constitutional role of Congress as the legislator, and the need for courts to exercise judicial restraint where Congress has acted:

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[21] *Miles*, 498 U.S. at 21-22 (Administratrix of the estate sought compensation for loss of support and services and loss of society resulting from the death of her son, *punitive damages*, and compensation to the estate for her son's pain and suffering prior to his death and for his lost future income. At trial, the District Court granted Apex's motion to strike the claim for *punitive damages*, ruled that the estate could not recover for son's lost future income, and denied Miles' motion for a directed verdict as to negligence and unseaworthiness.).

[22] *Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 69-71 (1913).

[23] *Miles*, 498 U.S. at 32.

[24] *Id.*

> The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that [seaman] had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.[25]

Lower courts, both state and federal, had consistently followed this Court's reasoning in *Miles* as precluding punitive damages in unseaworthiness actions.[26] However, in a ruling issued by the Washington Supreme Court in 2017, that court held that "a seaman making a claim for general maritime unseaworthiness can recover punitive damages as a matter of law." *Tabingo v. American Triumph LLC*, 391 P.3d 434 (Wash. 2017), cert. denied, 138 S. Ct. 648 (2018). The

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[25] *Id.*, 498 U.S. at 32-33.

[26] *See McBride*, 768 F.3d at 388-389; *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1455, 1457-1459 (6th Cir. 1993); *Wahlstrom v. Kawasaki Heavy Indus. Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296-297 (Tex. 1993); *Sky Cruises, Ltd. v. Andersen*, 592 So. 2d 756, 756 (Fla. Dist. Ct. App. 1992) (per curiam).

Ninth Circuit has now joined the Washington Supreme Court by holding in *Batterton v. Dutra* that punitive damages are available in an action under general maritime law based on a claim that the vessel was unseaworthy. These two rulings upset the uniform and understood legal precedents followed by the entire U.S.-maritime industry.

In *McBride*, the Fifth Circuit comprehensively reviewed the availability of damages in maritime cases and concluded that punitive damages are not available in unseaworthiness actions. *McBride*, 768 F.3d at 389-390. As the Fifth Circuit explained, *Miles* rather than *Townsend* provides the most direct guidance on that question. *Miles* instructs that courts considering a remedy in unseaworthiness cases should look to whether Congress has authorized that remedy in the Jones Act. *Id.* at 387-390. *Townsend* did not disturb that understanding; indeed, "[t]he Court [in *Townsend*] could not have been clearer in signaling its approval of *Miles* when it added: 'The reasoning of *Miles* remains sound.'" *Id.* at 390 (quoting Townsend, 557 U.S. at 420). *Townsend* expressly distinguished claims for maintenance and cure, which were at issue there, from claims for unseaworthiness, which were at issue in *Miles* (and are at issue here in *Batterton v. Dutra*): Whereas "the maintenance and cure right is 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under the Jones Act,'" "the [Jones Act] negligence/unseaworthiness actions are alternative, overlapping actions derived from the same accident and look toward the same recovery." *Id.* at 389 & n.36

(quoting *Townsend*, 557 U.S. at 423). The Fifth Circuit concluded that the available remedies must be assessed by reference to the cause of action and that *Miles* remains undisturbed.

Miles remains undisturbed and is the controlling precedent for unseaworthiness actions. Where this Court can find that a seaman ***killed*** as a result of an unseaworthy vessel cannot recover non-pecuniary losses, it is logical then that this Court should find that a seaman *injured* as a result of an unseaworthy vessel cannot recover non-pecuniary losses. Finally, Congress has not legislated that punitive damages are an available remedy and therefore, this Court should find that punitive damages cannot be an available remedy for an unseaworthiness claim.

III. Allowing Punitive Damages Creates Uncertainty and Disturbs Uniformity in the Maritime Industry

It is likely that allowing punitive damages to attach to an unseaworthiness claim would substantially increase the costs to shipowners through higher damage awards, higher settlements, and potentially higher insurance premiums (if insuring against punitive damages is legal).

Jones Act negligence and unseaworthiness claims are usually raised as companion claims and rely on the same set of facts to establish liability. Given the

"featherweight"[27] standard necessary to establish negligence under the Jones Act, and the strict liability standard for unseaworthiness, it would be easier for claimants to raise punitive damage claims that arise out of simple negligence. If punitive damages are available for unseaworthiness claims, vessel owners and operators will expend significantly more time, effort and expense defending against the specter of punitive damages. This will raise the monetary value of settlements. Companies will be forced to settle claims rather than engage in expensive and time-consuming litigation. Such changes will lead directly to substantial increases in insurance premiums for all Jones Act employers, not just the few who may be assessed punitive damages.

Dredging companies and the wider commercial maritime industry rely on traditional insurance policies to provide predictability. Liability policies that cover Jones Act and unseaworthiness claims generally exclude punitive damages from coverage, and some states prohibit insurers from covering punitive damages by statute or based on public policy.[28]

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[27] The "featherweight" causation standard is applied in Jones Act seamen's cases. *See Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957). ("Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.").

[28] *See Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962).

While certain large companies may be able to leverage insurers for this coverage, most small- and medium-size dredging contractors will not find a market offering coverage for punitive damages.[20] Some dredging companies may address this risk by retaining or diverting funds that would otherwise be used for increased productivity, hiring seamen and/or investing in capital improvements. Smaller dredging companies, however, may not have the financial ability to plan for a catastrophic punitive damage award. Ultimately, the cost of any insurance policy or design of a catastrophic fund will be factored into dredging contract proposals and, as such, costs would be passed onto the taxpayer – which is not fair to the dredging companies or the taxpayer.

CONCLUSION

Punitive damages should not be awarded to a Jones Act seaman in a personal-injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel. The general maritime claim here

[20] Some policies may be silent on the issue of coverage for punitive damages; in this circumstance, courts generally defer to the applicable state law for determination of whether punitive damages would be covered under the policy language. *See Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666 (5th Cir. 1992). Such a result is inconsistent with the need for uniformity in maritime contracts, and would further hamper employers from being able to anticipate an uninsured punitive damage claim, as payment for a punitive damage award could be different depending on where the vessel is operating.

alleged is that a seaman has been injured as a result of the unseaworthiness of the vessel. It would be inconsistent with this Court's place in the constitutional scheme were it to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of personal injury resulting from negligence.

The U.S. maritime industry has been living under a set of established laws and uniform rules with respect to unseaworthiness claims. Like the *Miles* Court concluded, damages available in unseaworthiness cases may not exceed the damages Congress allowed when it comprehensively addressed remedies for seamen in the Jones Act. Therefore, the U.S. Supreme Court should not impose a judicially created cause of action allowing punitive damages for unseaworthiness claims.

Respectfully submitted.

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No. 18-266

In The
Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE FISHING VESSELS' RESERVE, UNITED MARINE FUND, UNITED RESERVE FUND, WEST COAST MARINE FUND, PACIFIC MARINE FUND, AND AMERICAN MARINE FUND IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Fishing Vessels' Reserve ("FVR") was formed in 1944 by small groups of fishing vessel owners, and currently has approximately 175 members based from California to Alaska and Hawaii. The members of FVR and other amici listed below (collectively "funds") own "traditional" fishing vessels, generally smaller in size and owned by long-time fishing families.

United Marine Fund ("UMF") was formed in 1957 by small groups of fishing vessel owners, and currently has approximately 275 fishing vessel members based from California to Alaska and Hawaii.

United Reserve Fund ("URF") was formed around the same time as UMF by small groups of fishing vessel owners, and currently has approximately 125 fishing vessel members, primarily based in California.

West Coast Marine Fund ("WCMF") was formed in 1948 by small groups of fishing vessel owners, and currently has approximately 82 fishing vessel members, operating from California to Alaska.

Pacific Marine Fund ("PMF") was formed in 1973 by small groups of fishing vessel owners, and currently

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[1] Pursuant to Rule 37.6, the following certifications are made: The undersigned counsel authored this brief in whole; no party or party's counsel made a monetary contribution intended to fund preparing or submitting this brief; and no person, other than amici curiae, made a monetary contribution intended to fund preparing or submitting this brief. All parties consented to the filing of this amici curiae brief by filing written blanket consents.

has approximately 48 fishing vessel members, operating from California to Alaska.

American Marine Fund ("AMF") was formed in 1985 by small groups of fishing vessel owners, and currently has approximately 43 fishing vessel members, operating from California to Alaska.

The funds were established as the vessel owners were having difficulty obtaining insurance coverage through normal markets, and thus the owner members believed that if membership was limited to conscientious and responsible owners like themselves, they could minimize losses and obtain coverage at reasonable costs. The funds thus provide vessel insurance coverage for its owner members and operate as unincorporated associations for the benefit of its members, not for profit.

Since formation, the purpose and goals of the funds remains unchanged – to create an association of fishing vessel owners who share responsibility for each other's losses in order to encourage safe operation of members' vessels and eliminate accidents. In furtherance of this goal, each fund carefully screens new member applicants to ensure that vessels are sound and properly maintained and operated by experienced captain and crew. The funds have been widely recognized as outstanding examples of what can be accomplished in the fishing industry through cooperative efforts, with members working together to minimize accidents and losses.

Recognition of punitive damages for an unseaworthiness claim will adversely affect the funds' fishing vessel owners. As seamen invariably plead both Jones Act negligence and unseaworthiness claims, the threat of punitive damage exposure will result in higher settlement payments, which in turn will be passed onto the vessel owners through increased insurance costs, and in some instances, could render an owner uninsurable. Further, as punitive damages are generally excluded from coverage and many states bar insurers from insuring them, it will also result in significant uninsured exposure for vessel owners.

SUMMARY OF ARGUMENT

While admiralty courts possess the ability to provide supplemental remedies (e.g. recognize a new cause of action or measure of damages) when a maritime statute addresses a claim, Congress' judgment controls. *Miles v. Apex Marine*, 498 U.S. 19, 32-33 (1990). This express limitation precludes a court, under its admiralty powers, from creating a remedy for a general maritime law claim that exceeds those remedies available under the statute. As the Jones Act limits recoverable damages for injury and death claims to pecuniary loss damages only, this same limitation applies to an unseaworthiness claim [injury and death] involving a Jones Act seamen, as *Miles* makes clear.

Because punitive damages do not involve a pecuniary loss, they cannot be recovered.

The court of appeal misread *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009) to provide for a different result. In so doing, the court failed to recognize that *Townsend* confirmed *Miles*' holding and reasoning to be correct, but avoided application of the preclusive effects of the Jones Act by finding that, unlike an unseaworthiness claim, "the Jones Act does not address maintenance and cure." 557 U.S. at 420. As a result, the Court in *Townsend* was not constrained, as it was in *Miles*, by the fundamental principle that prevents an admiralty court from going "beyond the limits of Congress' ordered system of recovery for seamen's injury and death." *Id.*

In contrast to maintenance and cure, the Jones Act addresses unseaworthiness claims, as *Miles* held and *Townsend* affirmed. The governing principles thus apply to preclude supplementation and bar recovery of punitive damages. Further, the purpose for permitting punitive damages for maintenance and cure, which remains a necessary and foundational right of seamen dating back centuries, does not apply to unseaworthiness. Allowing punitive damages for an unseaworthiness claim would also result in significant harm, especially to vessel owners, which in some cases could prove irreparable.

ARGUMENT

I. The Preclusive Effect of the Jones Act Limits Recoverable Damages on Unseaworthiness Claims to Pecuniary Losses Only

In *Miles*, the Court applied fundamental principles that guide and limit an admiralty court's ability to provide supplemental remedies under general maritime law and held that the preclusive effect of the Jones Act barred recovery of non-pecuniary damages under a unseaworthiness wrongful death claim. *See* 498 U.S. at 32-33. In so ruling, the Court thus established a "uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOSHA, the Jones Act, or general maritime law." *Id.* at 33.

In reaching this result, the Court relied heavily on *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), finding the reasoning and logic of those decisions to be controlling. 498 U.S. at 27, 31. In *Moragne*, the Court applied these principles to hold that the Jones Act did not preclude recognition of a general maritime wrongful death action claim involving a longshoreman. *See* 398 U.S. at 400-401. Conversely, in *Higginbotham*, the Court found application of these principles limited recoverable damages for a maritime law death action to those statutorily available under the Death on High Seas Act. *See* 436 U.S. at 625.

Using *Moragne* and *Higginbotham* as examples of permissible and impermissible supplementation, the

Miles Court thus reinforced how a court must apply these long-established and fundamental principles in determining whether maritime statutory remedies can be supplemented, explaining:

> Respondents argued that admiralty courts have traditionally undertaken to supplement maritime statutes. The Court's answer in *Higginbotham* is fully consistent with those principles we have derived from *Moragne*: Congress has spoken directly to the question of recoverable damages on the high seas, and "when it does speak to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the act becomes meaningless." *Moragne* involved gap filling in an area left open by the statute; supplementation was entirely appropriate. But in an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries."

Miles, 498 U.S. at 31, *quoting Higginbotham*, 436 U.S. at 625.

Because the Jones Act addresses recoverable damages for death claims, the *Miles* Court held that application of these principles precluded supplementation, as it did in *Higginbotham*. In thus holding that recoverable damages for an unseaworthiness wrongful death claim could not exceed those available for a Jones Act death claim, the *Miles* Court stressed "it

would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases resulting from negligence." *Id.* at 32-33.

Miles thus makes clear that uniformity and concurrence with statutory law control and strictly limit an admiralty court's ability to provide supplemental remedies under general maritime law. While *Miles* involved a wrongful death action, application of these governing principles necessarily extend to personal injury actions. The court of appeals' erroneous suggestion that *Miles* does not apply to claims involving living seamen, *see* App. 14a, not only makes no sense and creates disuniformity, but reflects a fundamental misunderstanding of *Miles*.

Miles reinforces that limits imposed by Congress in maritime statutes control. As the Jones Act applies to personal injury and death actions, the statutory limits on recoverable damages likewise apply to all unseaworthiness claims involving seamen. Unsurprisingly, courts consistently interpret *Miles* and the governing principles to apply to personal injury actions. *See Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496, 1506 (5th Cir.1995) ("it should be clear that actions under the general maritime law for personal injury are also subject to the *Miles* uniformity principle"); *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir.1993) ("We agree . . . *Miles* has changed the law, and that wives of injured mariners may no longer sue the ship [under general maritime law] for damages for their nonpecuniary

losses"); *Horsley v. Mobil Corp.*, 15 F.3d 200, 202-203 (1st Cir.1994); *see Michel v. Total Transp., Inc.*, 957 F.2d 186, 191 (5th Cir.1992); *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 388 (5th Cir.2014), *cert. denied*, 135 S.Ct. 2310 (2015), *abrogated on other grounds by Townsend*, 557 U.S. 404 (2009).

As correctly noted by one respected commentator, "what the Court did in *Miles* is to decree that the measure of damages available to a Jones Act seaman for negligence and unseaworthiness under the general maritime law are identical in cases involving personal injury or death." Thomas J. Schoenbaum, Admiralty and Maritime Law § 5:10, p.4 (6th ed. Oct. 2018 Update) (italics omitted). Stated more accurately, *Miles* made explicit what this Court held long ago. *See Pacific Steamship Co. v. Peterson*, 278 U.S. 130, 138-139 (1928) ("whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or the negligence of the master or members of the crew . . . there is but a single legal wrongful invasion of his primary right of bodily safety . . . for which he is entitled to but one indemnity by way of compensatory damages").

II. The Lower Court Misread *Miles* and *Townsend*

In *Townsend*, the Court did not criticize or limit *Miles* holding. Instead, the Court not only found *Miles*' reasoning to be "sound" but agreed that a court could not create a supplemental remedy for a general maritime claim that exceeds the limits established by

Congress. *See* 557 U.S. at 419-420. The *Townsend* Court, though, avoided application of this principle by factually distinguishing *Miles*, noting that unlike an unseaworthiness wrongful death action, "[t]he Jones Act does not address maintenance or cure or its remedy." *Townsend*, 557 U.S. at 420-421.

For purposes of showing that Congress left to admiralty courts the job of fashioning damage and liability rules for a maintenance and cure claim, the Court pointed to the fact that maintenance and cure was "well-established before passage of the Jones Act." 557 U.S. at 420. As recognized by the Court, this right "dates back centuries as an aspect of general maritime law" and was well-established in this country when recognized by Justice Story in 1823. *Id.* at 413, *citing Harden v. Gordon*, 11 Fed.Cas. 480 (C.C.D. Me. 1823). Indeed, it traces back to the medieval sea codes, with the earliest authenticated statement of this right appearing around 1150 A.D. in the Laws of Oleron.[2] *See Harden*, 11 F. Cas. at 482-483; *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 730, fn. 6 (1943).

From ancient times to present, this foundational right remains relatively unchanged, and thus imposes an absolute obligation on the employer to pay for a seaman's medical care and wages if the seamen falls ill or becomes injured while in the service of the ship. *Townsend*, 557 U.S. at 413 (citations omitted). As

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[2] These laws were promulgated by Eleanor, Duchess of Guinne, for Oleron, an island off of the coast of France. *See* Francis L. Tetreault, Seamen Seaworthiness and the Rights of Harbor Workers, 39 Cornell L.Q. 381, 382-83 (1954).

maintenance and cure remains a no-fault obligation, neither negligence nor causation possess any relevance to an employer's obligation to pay. *See Pacific Steamship*, 278 U.S. at 137. Further, while an implied contractual provision in a seaman's contract, it cannot be waived by contract. *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 989 (9th Cir.1987) (citations omitted).

The *Townsend* Court also stressed the distinctive nature of the claim as further evidence that the preclusive effects of the Jones Act do not apply. Unlike unseaworthiness and negligence, which are merely alternative causes of action to establish liability for the same wrong, maintenance and cure is "independent and cumulative." 557 U.S. at 423. As it is separate and apart from these other two claims, a "seaman may have maintenance and cure and also one of the other two." *Id.* at 424, *quoting* Gilmore & Black, § 6-23, at 342 (internal quotation marks omitted).

With these reasons in hand, the Court found it "possible to adhere to this traditional understanding of maritime actions and remedies without abridging or violating the Jones Act [because] this traditional understanding is not a matter to which 'Congress has spoken directly.'" *Id.* at 420-421, *quoting Miles*, 498 U.S. at 31. For purposes of supporting its holding that punitive damages were proper for penalizing the wrongful holding of this necessary and foundational right, the Court also stated that failure to provide adequate medical care served "the basis for rewarding punitive

damages in cases decided as early as the 1800's."[3] *See* 557 U.S. at 413.

In contrast to maintenance and cure, the Jones Act addresses unseaworthiness claims, as *Miles* clearly held and *Townsend* acknowledged. The governing principles thus apply to preclude supplementation and limit recoverable damages to those statutorily available for Jones Act claims. While this alone precludes an award of punitive damages, the court of appeals also failed to appreciate that the other reasons the *Townsend* Court relied on do not apply to an unseaworthiness claim.

Unlike maintenance and cure, unseaworthiness remained far from being a long-established general maritime claim when the Jones Act passed in 1920. At best, it was "an obscure and relatively little used remedy; largely because a shipowner's duty at that time was only to use due diligence to provide a seaworthy ship." *Miles*, 498 U.S. at 25 *(quote omitted)*. It continued to remain unused until transformed into a strict liability obligation by this Court in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

By way of historical background, expansion of the unseaworthiness doctrine from cargo, insurance and wage forfeiture cases into injury cases began with dictum in *The Osceola*, 189 U.S. 158 (1903). In that case, the sole question before the Court involved whether a

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[3] In his dissenting opinion, Justice Alito noted that these cases do not resolve the question of punitive damage availability. *See* 557 U.S. at 429-31.

seaman could recover for injuries resulting from a negligent order given by the master. Prior to addressing this question, Justice Brown set forth four propositions that were allegedly "settled" in maritime law, with the second one declaring "the vessel and her owner are . . . liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship. . . ." *Id.* at 175. As recognized by Justice Frankfurter and many commentators, this second proposition is dictum, as unseaworthiness was not before the Court. *See Mitchell v. Trawler Racer, Inc.*, 360 U.S. 539, 562 (1960) (Frankfurter, J., dissenting); Tetreault, 39 Cornell L.Q. at 391.[4]

According to one commentator, the process of turning Justice Brown's dictum into "settled" law commenced with *Mahnich*. *See* Editors, Law Review (1962), "A New Look at the Unseaworthiness Doctrine: The *Roper* Case," Univ. Chicago Law Rev. Vol. 29, Issue 3, Article 7, pg. 523. *Mahnich* changed the "shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence." *Moragne*, 398 U.S. at 399. Following *Mahnich*, this Court continued to expand the unseaworthiness doctrine in a series of cases, and it "has [now] become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act." 398 U.S. at 399.

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[4] Further, the authority cited by Justice Brown for this proposition, *Scarff v. Metcalf*, 107 N.Y. 211 (1887), does not appear to support it. *Scarff* involved a different issue, with the court holding the owners of the ship liable for negligence of the ship's master in failing to provide adequate medical care for an ill seaman.

This judicially created maritime claim, which undeniably did not exist in the same form in 1920 as today, differs in marked contrast to the maintenance and cure claim at issue in *Townsend* which has been an established foundational right of seamen since the Middle Ages.

Further, unlike maintenance and cure, unseaworthiness does not provide cumulative or additional damages separate and apart from a Jones Act negligence claim. Instead, it merely provides an alternative cause of action to a Jones Act claim to recover the same compensatory damages for the seaman's injuries or death. *See Pacific Steamship*, 278 U.S. at 138-139.

Finally, no court has ever awarded punitive damages for an unseaworthiness claim prior to the Jones Act. While this can be explained by the fact that unseaworthiness was an obscure and little known remedy when the Jones Act passed, it can also be explained by this Court's decisions in *The Osceola* and *Pacific Steamship* which show that only compensatory damages could be recovered on an unseaworthiness claim.[8] Another reason involves the fact that the justifications for establishing the foundational right of maintenance

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[8] The dictum in *The Osceola* provides in relevant part that a vessel and her owner are "liable to an indemnity for injuries received by seamen" resulting from unseaworthiness. 189 U.S. at 175. *Pacific Steamship* clarified that the phrase "liable to an indemnity" means "indemnity by way of compensatory damages." 278 U.S. at 138.

and cure[6] and protecting it through punitive damages do not exist with an unseaworthiness claim.

The court of appeal failed to appreciate the foregoing significant differences between unseaworthiness and maintenance and cure claims, and in so doing, did not recognize that the reasons *Townsend* relied on to permit punitive damages for a maintenance and cure claim do not apply to an unseaworthiness claim. *Miles* makes clear that the Jones Act limit on recoverable damages apply instead.

III. The Jones Act Bars Recovery of Punitive Damages

As held by *Miles* and reconfirmed by this Court, the Jones Act limits recovery to *pecuniary loss* damages. *Miles*, 498 U.S. at 32; *Zicherman v. Korean Airlines Co., Ltd.*, 516 U.S. 217, 224 (1996) (confirming *Miles'* holding that the Jones Act "permits compensation only for pecuniary loss"). The Federal Employers'

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[6] In explaining the justifications supporting creation of this ancient right, Justice Story explained: "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour.... If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometime perish from want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of the sickness; and if liable to be so applied, the great motives for good behavior might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt." *Harden*, 11 F. Cas. at 483.

Liability Act ("FELA"), which Congress incorporated into the Jones Act, contains this same pecuniary loss damage limitation. *See Miles*, 498 U.S. at 32; *American R.R. Co. of Puerto Rico v. Didricksen*, 227 U.S. 145, 149 (1913); *Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 65, 69-71 (1913); *Gulf, Colorado and Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 175-176 (1913); *St. Louis, Iron Mtn. & Southern Ry. Co. v. Craft*, 237 U.S. 648, 656, 657 (1915).

Pecuniary loss means damages that provide compensation for an actual financial loss. *See Didricksen*, 227 U.S. at 149 (recoverable damages "limited strictly to the financial loss thus sustained"); *McGinnis*, 228 U.S. at 175-76 (stating recovery is "limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss"). As punitive damages do not provide compensation for financial loss, but instead serve to punish and deter, courts uniformly hold punitive damages cannot be recovered under the Jones Act and FELA. *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-561 (9th Cir.1984); *Horsley*, 15 F.3d 200, 203; *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir.1993); *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 389 (5th Cir.2014), *cert. denied*, 135 S.Ct. 2310 (2015); *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1240 (6th Cir.1971); *Wildman v. Burlington N. R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir.1987); *see also Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1094 (2d Cir.1993); *Guevara*, 59 F.3d at 1506

("punitive damages . . . are also rightly classified as non-pecuniary").

Further, even if considered in the absence of the preclusive effects of the Jones Act and viewed solely in the context of whether punitive damages could be recovered on a pre-Jones Act unseaworthiness claim, the result barring recovery remains unchanged. Putting aside that there are no cases awarding punitive damages, this Court has made clear that only "indemnity by way of compensatory damages" could be recovered on this claim. *See Pacific Steamship*, 278 U.S. at 138. As explained in *Milwaukee & St. Paul Railway v. Arms*, which involved injury to a passenger, a court "goes beyond the limit of indemnity" when it awards "exemplary" damages. 91 U.S. 489, 493-494 (1875). Numerous lower courts have made similar observations, and thus treat the term indemnity to preclude punitive damages. *See McBride*, 768 F.3d at 388 (citing to cases). As noted by Judge Clement in *McBride*, "taking *The Osceola* and *Pacific Steamship* Courts at their word – as contemporaneous plaintiffs did when they filed Jones Act cases rather than unseaworthiness cases – unseaworthiness defendants are [therefore] liable for an indemnity by way of compensatory damages and nothing more." 768 F.3d at 399 (Clement, J., concurring).

Presumably in an attempt to avoid the foregoing bar to recovery of punitive damages, the court of appeals stated that such damages do not constitute a pecuniary loss or non-pecuniary loss. *See* App. 14a. While not clear from the decision, the court appears to

suggest that this distinction, which is legally incorrect, somehow avoids *Miles* and permits recovery of punitive damages. Even assuming arguendo that punitive damages did not involve a non-pecuniary loss, they would still be barred, as only pecuniary loss damages can be recovered under a general maritime law claim for unseaworthiness, as *Miles* makes clear.[7]

IV. Awarding Punitive Damages Will Result In Significant Financial Harm, Which Could Prove Irreparable

Traditional commercial fishermen, like the approximate 750 vessel owners that are members of the funds, depend on protection and indemnity insurance to protect against liabilities arising from injuries to crew members. Punitive damages are generally excluded from such coverage. Further, many states, including California, New York, Florida, New Jersey and Rhode Island, preclude insurance coverage for punitive damages.[8] In those instances where no coverage exists,

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[7] A prior Ninth Circuit panel rejected a similar argument to recover punitive damages under DOSHA; wherein, the plaintiffs claimed that punitive damages did not involve the type of non-pecuniary damages that *Higginbotham* barred. *See Bergen v. St. Patrick*, 816 F.2d 1345, 1349 (9th Cir.1987).

[8] *See* Cal. Ins. Code § 533 (2010) (California); *Home Ins. Co. v. Am. Home Prod. Corp.*, 75 N.Y.S. 2d 196, 200-201 (App. 1990) (New York); *U.S. Concrete Pipe Co. v. Bould*, 437 So.2d 1061, 1064 (Fl. 1983) (Florida); *Johnson & Johnson v. Aetna Cas. & Sur. Co.*, 285 N.J.Super. 575, 587-89 (App.Div. 1995) (New Jersey); *Allen v. Simmons*, 533 A.2d 541, 544-545 (R.I. 1987) (Rhode Island).

the vessel owner will be left exposed to significant uninsured liability.

Further, as seamen almost invariably plead both Jones Act negligence and unseaworthiness claims, the threat of punitive exposure will force vessel owners and their insurers to pay more to settle claims than they are worth. This in turn will adversely affect the vessel owner's loss history and not only result in increased insurance costs but could render the owner uninsurable. The inability to obtain insurance would effectively put a commercial fisherman out of business and require the sale of their vessels.

While vessel owners may be able to pass on some of these increased insurance costs to purchasers of their fish catches, the majority of these costs will be borne by the owners. This in turn will affect their ability to remain in business, and could cause many to leave the industry. Further, for those cases that do not resolve and go to trial, the vessel owner could find itself liable for an uninsured punitive damage award. Given the awards handed out in the current climate, this would likely lead to financial ruin.

Small businesses, like fishing vessel owners, are the basis upon which the United States was founded. While they remain a vital and integral part of the economy, they do far more. They provide people with entrepreneurial spirits and the will to work hard an opportunity to succeed, and thus help keep alive the "American Dream." Fishing vessel owners already face significant perils and risks in performing their work,

which they have readily accepted for years without complaint. The risk of punitive damages is a risk too far, especially since it could bring an abrupt end to many family owned businesses.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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No. 18-266

In The Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION, INC. AND OFFSHORE MARINE SERVICE ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The Greater New Orleans Barge Fleeting Association, Inc. ("GNOBFA") is a non-profit association of companies in the operation of barge fleets and towboats on the Mississippi River from New Orleans, Louisiana to Baton Rouge, Louisiana. The purpose of the Association is to promote professional relationships between members, to disseminate information pertaining to the river and fleeting industry, to support member companies when consistent with the interests of the organization as a whole, and to improve relations with surrounding communities, regulatory governmental bodies, and other professional organizations.

Based in New Orleans, Louisiana, the Offshore Marine Service Association ("OMSA") is the leading association of and spokesman for the offshore marine transportation service industry in the United States. OMSA is a trade organization comprised of nearly 170 members. Its members include 70 companies that own and operate vessels that construct, maintain, repair, and transport supplies and workers to and from the thousands of oil and gas facilities in the Gulf of Mexico. OMSA's members also include shipyards, surveyors, vessel equipment manufacturers and distributors, training providers, financial institutions, attorneys and

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[1] Pursuant to this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *Amici Curiae* and its counsel made a monetary contribution to its preparation or submission. Both Petitioner and Respondent have filed blanket consents to the filing of *Amici Curiae* briefs in support of either party.

accountants that support the offshore service and supply industry. Although OMSA's members are primarily Gulf-based, the members employ maritime workers from around the United States.

Both GNOBFA and OMSA have a strong interest in the outcome of this Honorable Court's decision. Both associations are based in Louisiana and the operations of their members are largely centered along the coast and inland waterways of the area contained in Louisiana's First Congressional District. As a result, the First Congressional District is home to over 33,000 Jones Act jobs, according to a private study performed by PricewaterhouseCoopers ("PwC"). The domestic maritime industry in Louisiana's First Congressional District generates $8.97 billion in economic impact annually, including $2.07 billion in worker income. This makes the First Congressional District the congressional district with the most maritime jobs, likewise, Louisiana is the top domestic maritime state in the United States with over 70,000 Jones Act jobs, the vast majority of which are provided by members of GNOBFA and OMSA.[2] The total economic impact in Louisiana is over $18.2 billion annually.[3] As representatives of various marine operators, who are subject to the Jones Act and the General Maritime Law doctrine

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[2] Press Release, Transportation Institute, Contribution of the Jones Act Shipping Industry to the U.S. Economy (publication forthcoming) (prepared by PricewaterhouseCoopers in October 2018).

[3] *See supra* note 2.

of unseaworthiness, *Amici* file this brief in support of the Petitioner and against the imposition of punitive damages on vessel owners.

SUMMARY OF THE ARGUMENT

Levying punitive damages against a vessel owner under the General Maritime Law for unseaworthiness will result in irreversible and monumental changes that threaten the continued sustainability of the maritime industry and its actors. By its very nature, an unseaworthy condition arises without the knowledge of the vessel owner. But, an award of punitive damages presumably requires a finding of reckless and wanton behavior, thereby implicating standards of negligence as well. The uncertainty of where a seaman's strict liability cause of action for unseaworthiness ends and his claim for negligence begins militates against awarding such damages.

Moreover, allowing such awards would not further the ultimate goal of punitive damages. Punitive damages are meant to deter and punish wrongful conduct. In many instances, an unseaworthy condition does not arise by any action on the part of the vessel owner, but instead by the actions of third parties. Thus, imposing punitive damages on the vessel owner under such circumstances would not deter and punish the proper party.

Awarding punitive damages will leave a lasting impact on the maritime industry and all maritime

actors. Punitive damages are often uninsurable. If a vessel owner can be subject to punitive damages, he could attempt to shift any risk to other unwilling maritime actors. This shift would result in severe repercussions on the maritime industry including a vast increase in the costs of shipping, transportation, and ultimately domestic and foreign trade.

Lastly, the advent of punitive damages in an unseaworthy action will undoubtedly lead to an increase in litigation. Any seaman injured by an alleged unseaworthy condition will bring a claim for punitive damages and force the vessel owner to defend. The threat of punitive damages will result in vessel owners incurring unnecessary defense costs to guard against unfounded or unsubstantiated claims. Moreover, foreign seaman will be encouraged to engage in transoceanic forum shopping and pursue causes of action in the United States in hope of receiving punitive damages.

ARGUMENT

I. Permitting punitive damages awards against vessel owners for an unseaworthy condition will result in a quagmire of uncertainty and upset a century of precedent.

Throughout its development and evolution, the doctrine of unseaworthiness has become less and less predictable for vessel owners, thereby subjecting them to inconsistency and uncertainty regarding the standard of care owed. By denying the imposition of punitive

damages against a vessel owner, this Honorable Court can bring not only clarity, but also transparency to the maritime industry and its various actors.

A Jones Act seaman has three primary avenues of recovery from his employer: maintenance and cure,[4] unseaworthiness, and Jones Act negligence. The unseaworthiness doctrine imposes on a vessel owner a non-delegable duty to ensure that the vessel, its crew, and its appurtenances remain reasonably fit for their intended purpose.[5] In *Mitchell v. Trawler Racer, Inc.*, this Court expounded upon the duty owed by vessel owners:

> What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. *The standard is not perfection, but reasonable fitness*; not a ship that will weather every conceivable storm or withstand every imaginable peril of

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[4] Dating back to the 13th century, courts recognized that, "the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued." *The Osceola*, 189 U.S. 158, 175 (1903). Maintenance and cure refers to the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while in the service of the vessel. *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001). The remedy entitles the seaman to maintenance and cure until he reaches maximum medical improvement. *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962).

[5] *See Vargas v. McNamara*, 608 F.2d 15 (1st Cir. 1979).

> the sea, but a vessel reasonably suitable for her intended service.[6]

Therefore, the vessel owner may be liable for an unseaworthy condition regardless of the vessel owner's knowledge of the condition.

In the doctrine's early history, the vessel owner was liable for failure to exercise due diligence, a standard of care akin to the duty of a shoreside employer to exercise ordinary care to provide a reasonably safe place to work.[7] It was not until the 1940s that the doctrine of unseaworthiness evolved into a strict liability claim.[8] Although the claim today imposes strict liability, the duty owed by the vessel owner still implicates a question of "reasonableness,"[9] likely a vestige of this historical development. For that reason, unseaworthiness often overlaps with Jones Act negligence.

A vessel could be unseaworthy for any number of reasons: (1) defective gear; (2) appurtenances in disrepair; (3) an unfit crew; (4) improper manning; or

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[6] *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960) (emphasis added).

[7] *Mitchell*, 362 U.S. at 544 (explaining the standard of care owed and citing early jurisprudence regarding such).

[8] *See Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

[9] *Colon v. Trinidad Corp.*, 188 F. Supp. 97, 100 (S.D.N.Y. 1960) ("[A] seaman is not absolutely entitled to a deck that is not slippery. He is absolutely entitled to a deck that is not unreasonably slippery."). *See also Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 543–45 (1960) (detailing the origins and development of the unseaworthiness doctrine).

(5) improper method of loading cargo or manner of stowage.[10] "An unseaworthy condition can be found in almost anything, no matter how trivial, that causes injury."[11] A vessel can also be rendered unseaworthy due to the negligent act of a member of the crew, who creates a condition aboard the vessel. However, a vessel owner will not be held liable for an "isolated, personal negligent act" of an employee or member of the crew.[12] Notably, the vessel owner need not create the unseaworthy condition for liability to be imposed. For example, the negligence of third parties or contractors can create an unseaworthy condition aboard a vessel.

Moreover, unseaworthy appurtenances brought on board without the vessel owner's sanction or knowledge can also render the vessel owner liable for any resultant injuries.[13] Such third-party generated unseaworthiness is easily created in the modern day offshore service industry, in which OMSA's members engage. In this industry, the newest and largest class of vessels regularly carry in excess of 100 mariners and industrial workers. Of this amount, the vessel owner directly employs only 20 to 30, also known as the marine crew. The remaining mariners are usually contractors

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[10] *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499 (1971).

[11] Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 HARV. L. REV. 819, 820 (1963).

[12] *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 500 (1971).

[13] *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422, 426 (5th Cir. 1966).

employed by the vessel's owner or the vessel's charter. These individuals are charged with, among other tasks, operating and maintaining the appurtenances of the vessel, such as remote operated vehicles ("ROVs"), cranes, and seismic sensing equipment. In a limited but gradually growing number of cases, appurtenances owned, maintained, and operated by the contractor's employer, such as offshore gangways, are placed on the vessel by the vessel's charter. In this case, an appurtenance could be owned, maintained, and operated by third parties who do not work for the vessel owner. Thus, if the decision of the United States Court of Appeals for the Ninth Circuit stands, in this modern industry, a vessel owner is more likely to face punitive damages for injuries caused by appurtenances placed on the vessel by a third party.

Pursuant to the Jones Act, a seaman may bring a claim for negligence against his Jones Act employer for the employer's failure to exercise ordinary care or for the negligence of a fellow crew member.[14] However, because the Jones Act employer typically owns the vessel, more often than not, a seaman's cause of action for unseaworthiness and his Jones Act negligence claim overlap.[15] In fact, "it will be rare that the circumstances of

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[14] Jones Act, 46 U.S.C. § 30104.

[15] *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 815 (2001) ("We are able to find no rational basis, however, for distinguishing negligence from unseaworthiness.") *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-38 at 383 (2d ed. 1975) (explaining that Jones Act negligence and unseaworthiness are "Siamese twins.").

an injury constitute negligence but not unseaworthiness."[16] The two claims are alternative grounds of recovery[17] and the seaman is owed "but one indemnity" and may recover for either employer negligence or unseaworthiness, but not both.[18]

Punitive damages are defined as "damages assessed by way of penalizing the wrongdoer or making an example to others."[19] Based on this principle, courts throughout the United States often award punitive damages in addition to compensatory damages, and "the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."[20] A claim for punitive damages against a tortfeasor typically requires showing willful, wanton, or reckless indifference for the safety of others.[21] In *Exxon Shipping Co. v. Baker*, for example, a district court imposed punitive damages on an employer who knew that the Captain of its vessel was prone to substance

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[16] *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 418 (1953) (Frankfurter, J., concurring).

[17] *McCallister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225 (1958).

[18] *Pac. S.S. Co. v. Peterson*, 278 U.S. 130, 138 (1928) ("[W]hether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong . . . for which he is entitled to but one indemnity by way of compensatory damages.").

[19] *Punitive Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[20] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008).

[21] *Id.* at 493.

abuse and who frequently drank aboard the vessel.[22] Thus, in order to award punitive damages for unseaworthiness, a court or jury would need to find that the vessel owner recklessly or knowingly created an unseaworthy condition or allowed such a condition to exist. However, this heightened standard also implicates the Jones Act employer's duty to exercise reasonable care.[23]

It is well-settled that a seaman may not recover punitive damages under the Jones Act from his employer.[24] The intimate relationship between unseaworthiness and Jones Act negligence renders the two claims analytically impossible to separate.[25] There is no clear line of demarcation that signals where the vessel owner's duty to provide a seaworthy vessel ends and where his duty to exercise reasonable care begins.

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[22] *Id.* at 476–77.

[23] *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 374 (5th Cir. 1989) ("While a Jones Act employer's duty to provide a safe place for the seaman to work is a broad one, the employer must have notice and the opportunity to correct an unsafe condition before liability attaches. The standard of care is not 'what the employer subjectively knew, but rather what it objectively knew or should have known.'") (internal citations omitted).

[24] *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987), *opinion modified on reh'g*, 866 F.2d 318 (9th Cir. 1989) ("Punitive damages are non-pecuniary damages unavailable under the Jones Act."); *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) ("It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under the Federal Employers' Liability Act. Punitive damages are not therefore recoverable under the Jones Act.").

[25] *Peterson*, 278 U.S. at 138.

If a vessel owner engages in reckless behavior rendering the vessel unseaworthy, the vessel owner has also violated its Jones Act duty to furnish a safe place to work.[26] In the seaman's subsequent action against his employer, the court cannot practically separate the two claims from one another. Therefore, the court essentially will impose punitive damages for the violation of the same legal wrong and merge the two separate doctrines. This result is unworkable in practice and would cause confusion and uncertainty with lower courts attempting to distinguish between these two inextricably linked causes of action.

Although a situation may arise in which the vessel owner is not also the Jones Act employer, the uniformity principle dictates that punitive damages should not be available in any action.[27] Congress maintains the "paramount power" to determine maritime law,[28] however, in the absence of a controlling statute, the federal judiciary may develop and create General Maritime Law.[29] Therefore, General Maritime Law, as developed by the federal courts, coexists with and supplements statutory maritime law as set and pronounced by Congress. Federal courts consistently stress that "the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country," when it granted jurisdiction over admiralty

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[26] *Gautreaux v. Scurlock Marine*, 107 F.3d 331 (5th Cir. 1997).

[27] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990).

[28] *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917).

[29] *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864–65 (1986)

cases to federal courts.[30] This uniformity principle serves as a guide not only to Congress, but also federal courts to maintain a consistent body of rules throughout the country.[31] Uniformity grants predictability and stability for maritime actors engaged in commerce throughout the United States.[32] Hence, permitting punitive damages in one situation, but disallowing in another would promote disharmony and tension in maritime law as well as instability in the maritime industry.

Allowing punitive damages for unseaworthiness is theoretically impossible and would reverse a century of precedent denying punitive damages under the Jones Act. Accordingly, awarding punitive damages for an unseaworthiness claim would cause a quagmire of uncertainty[33] regarding the vessel owner's duty to

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[30] *The Lottawanna*, 88 U.S. 558, 575 (1874). *See Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918).

[31] *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

[32] For example, although OMSA's members primarily engage in commerce in the Gulf of Mexico, its members employ seamen from over thirty (30) states. This widespread industry needs a uniform principle throughout the country for its various industry actors.

[33] The imposition of punitive damages for unseaworthiness is further complicated by the "pockets" of *Sieracki* seamen, or seamen *pro hac vice*, who are not members of a vessel's crew, but who may bring an unseaworthiness action against the vessel owner. *See Radut v. State Street Bank & Trust Co.*, 2005 A.M.C. 413 (S.D.N.Y. 2004); *Green v. Vermilion Corp.*, 144 F.3d 332 (5th Cir. 1998) (holding that a cook/watchman performing duties traditionally performed by a seaman was owed the duty of seaworthiness and the General Maritime Law negligence duty to protect his safety).

provide a reasonably safe place to work versus his duty to provide a reasonably fit vessel.

II. Awarding punitive damages against the vessel owner does not accomplish the stated goal of such damages.

The imposition of punitive damages against the vessel owner will not achieve their indicated purpose. Punitive damages are meant to deter wrongful conduct and punish the actor.[34] In the 1818 case of *The Amiable Nancy*, Justice Story noted that damages aimed at deterrence were proper in certain circumstances and explained, "if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishments which belongs to such lawless misconduct."[35]

For the same reasons pronounced by Justice Story, it would be improper to assess punitive damages against a vessel owner in some unseaworthy cases. Oftentimes, an unseaworthy condition aboard a ship arises due to the negligence of a third party, an employee of the vessel owner, or by no action at all.[36] In

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[34] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008).

[35] 16 U.S. 546, 558 (1818).

[36] *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960) (noting that the accumulation of slime and fish gurry during unloading operations could constitute an unseaworthy condition); *Barlas v. United States*, 279 F. Supp. 2d 201 (S.D.N.Y. 2003) (holding that a plastic packing strap on the deck of a vessel constituted an unseaworthy condition); *Seemann v. Coastal Envtl. Grp., Inc.*, 219

these cases, the vessel owner played no part in the creation of the condition, and, yet would potentially be subject to punitive damages, while the "original wrongdoer" escapes blame and liability. Under these circumstances, public policy disfavors awarding punitive damages against the vessel owner.

For example, a "bellicose" seaman aboard the M/V ARCHON rendered a vessel unseaworthy, because the seaman stabbed a fellow crew member repeatedly, killing him.[37] An unfit crew renders a vessel unseaworthy, but in such a situation an award of punitive damages against the vessel owner would not deter the "extraordinarily violent" behavior of the seaman. It would be more proper to assess punitive damages against the bellicose seaman and not against the vessel owner. *Amici* recognize the contrary argument that punitive damages should be assessed against the vessel owner when the vessel owner knows of the condition, but recklessly disregards the potential problem. However, once again, the vessel owner's knowledge of the unseaworthy condition implicates his Jones Act duty to exercise reasonable care under the circumstances.

F. Supp. 3d 362, 369 (E.D.N.Y. 2016) (noting that the United States Court of Appeal for the Second Circuit has held that the presence of ice on a ship's deck may present an unseaworthy condition).

[37] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 21–22 (1990).

III. The imposition of punitive damages will cause a disruption in maritime commerce.

The fundamental interest of maritime jurisdiction is the "protection of maritime commerce."[38] Maritime actors are more willing to engage in commerce if they have the ability to purchase and enforce risk protection.[39] Punitive damages are generally uninsured risks[40] that can cause a major disruption in maritime commerce with maritime actors shifting such risks amongst each other and ultimately to the consumer.

Congress envisioned that "federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country."[41] Various admiralty courts recognize that "the need for predictability in the commercial maritime arena is arguably greater than in other areas of law and commerce."[42] Uniformity and the "companion quality of predictability, a prized value in the extensive underwriting of marine risks,

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[38] *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004) (quoting *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991)).

[39] *Ill. Constructors Corp. v. Morency & Assoc.*, 794 F. Supp. 841, 843 (N.D. Ill. 1992) ("The importance of insurance for maritime operations is evident in view of the devastation to maritime commerce that accidents at sea engender and the protection insurance may afford shipowners.").

[40] *Nw. Nat. Cas. Co. v. McNulty*, 307 F.2d 432, 445 (5th Cir. 1962). *See also Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 688 (Tex. 2008) (generally discussing various states' public policy regarding insuring punitive damages).

[41] *Miles*, 498 U.S. at 27.

[43] *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1137 (5th Cir. 1995).

are best preserved by declining to recognize a new and distinct doctrine without assuring the completeness of its fit."[43] The U.S. Fifth Circuit has explained "[i]t is axiomatic that when the rules of law are clear, parties may contract within or around their boundaries, and the commercial system is facilitated in many ways, including reduced litigation, more favorable insurance coverage, and overall ease of application."[44]

Punitive damages threaten the continued sustainability of the maritime industry and will force vessel owners to increase prices downstream, thereby affecting maritime commerce and even other industries.[45] Moreover, as discussed previously, awarding punitive damages for unseaworthiness does not "fit" within the General Maritime Law and its well-established doctrines. For example, a bareboat charterer, as a demise charterer, is the owner *pro hac vice* of the vessel for the duration of the charter. As such, the bareboat charterer is liable *in personam* for the unseaworthiness of the

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[43] *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983).

[44] *Coats*, 61 F.3d at 1137.

[45] *McBride v. Estis Well Serv., LLC*, 768 F.3d 382 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015) (Clement, J., concurring) ("Given the sizeable percentage of the world's goods that travel on ships, and the fact that the prices of the remainder of the world's goods are indirectly influenced by the prices of the goods that do travel on ships (*e.g.*, oil prices ultimately affect the price of a vast range of items), the decision in this case needs to have only the minutest impact on shipping prices to have a significant aggregate cost for consumers. In light of the potentially sizeable impact, this court should not venture too far and too fast in these largely uncharted waters without a clear signal from Congress.").

vessel,[46] however, the vessel owner remains liable *in rem*. If a seaman pursues punitive damages for an unseaworthy condition, it is unclear which party would be assessed punitive damages. This uncertainty will result in both parties factoring this potential cost into the charter agreement, thereby, dramatically affecting costs in the maritime industry.

The above is but one example of a myriad of situations in which increased risks will lead to increased prices. The economic impact of punitive damages and the attendant repercussions on maritime industry is a serious factor that should not be taken lightly. Nationally, the domestic maritime industry accounts for over 648,000 jobs, $41.6 billion in labor compensation, $154.8 billion in economic output, $72.4 billion in value added, and $16.8 billion in taxes.[47] Moreover, America's domestic fleet is comprised of more than 40,000 vessels – one of the largest fleets in the world. Awarding punitive damages for unseaworthiness will impact not only large corporations operating hundreds of vessels, but also smaller "mom and pop"[48] operations employing one vessel. This Court has jealously guarded maritime commerce throughout its history and must continue to do so.[49]

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[46] *Forrester v. Ocean Marine Indem. Co.*, 11 F.3d 1213, 1215 (5th Cir. 1993).

[47] *See supra* note 2.

[48] By way of example, more than 50% of OMSA's vessel owners own six vessels or less.

[49] *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004).

IV. Permitting punitive damages awards will result in increased litigation and transoceanic forum shopping.

Should this Court decide to allow a seaman to recover punitive damages for unseaworthiness, every seaman will bring a claim against a vessel owner for punitive damages irrespective of its legitimacy. Any crewmember who suffers injuries as a result of an unseaworthy vessel will pursue punitive damages from the vessel owner, regardless of whether the vessel owner acted in a wanton or reckless manner. The mere threat of a claim for punitive damages will force vessel owners to defend any and all claims no matter how unsubstantiated or unfounded. This increase in litigation and its attendant costs will also disrupt maritime commerce and increase costs on maritime industry overall.

Moreover, allowing punitive damages could result in transoceanic forum shopping. The majority of foreign countries do not allow awards of punitive damages,[50] except in very limited and specific circumstances.[51] This Court in *Exxon Shipping Co. v. Baker*, noted, "punitive

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[50] In addition, this further evidences the potential economic impact on maritime commerce. Should the Court impose punitive damages, U.S.-flagged vessels will be at a disadvantage competing with foreign-flagged vessels, who would not otherwise be subject to punitive damages under the law of their country, thereby allowing foreign vessels a cost-base advantage. This is particularly true for members of OMSA who compete with these foreign-flagged vessels performing the same work and services.

[51] *See* John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507 (2007).

damages overall are higher and more frequent in the United States than they are anywhere else."[52] Although transoceanic forum shopping by foreign seamen may be combatted on the grounds of *forum non conveniens*, foreign seamen will still bring suit in the United States in anticipation of recovering punitive damages. The United States Court of Appeals for the Eleventh Circuit has recognized this problem and described one plaintiff as "the archetypal foreign plaintiff bringing her foreign tort claim to American courts to secure relief more generous than she would get under the law of her homeland."[53] Similar to the plaintiff in *Sigalas*, a foreign crewmember with an unseaworthiness claim is encouraged to bring suit in the United States, for even the slightest possibility of recovering such damages.

CONCLUSION

Although punitive damages have been recognized as part of the General Maritime Law, they have no place in the doctrine of unseaworthiness. Awarding punitive damages for an unseaworthy condition would inextricably fuse the cause of action with a seaman's Jones Act negligence claim against his employer. Furthermore, in most cases, punitive damages will not result in deterrence or retribution, because the vessel

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[52] 554 U.S. 471, 484 (2008).

[53] *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1520 (11th Cir. 1985).

owner neither created nor played any part in the creation of the unseaworthy condition. Moreover, imposing punitive damages on a vessel owner will result in tremendous repercussions in the maritime industry, leading to a disruption in commerce and increased costs to be borne by the ultimate consumer. Lastly, punitive damages awards encourage litigation and embolden foreign seamen to engage in transoceanic forum shopping.

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No. 18-266

In The Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF INJURED CREWMEMBERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are crewmembers injured in the service of their ships who have pending claims under the Jones Act, 46 U.S.C. § 30104, and the general maritime law's unseaworthiness doctrine. Each *amicus* claims punitive damages based on his employer's egregious misconduct. *Amicus* Tevrin Narcisse's action is pending in Washington Superior Court for the County of King as *Narcisse v. Crowley Liner Services, Inc.* *Amicus* James Stelpstra's action is pending in California Superior Court for the County of Alameda as *Stelpstra v. Matson Navigation Co.* Their ability to pursue their punitive-damages claims may well depend on, and *amici* accordingly have a strong interest in, the outcome of the present case.

SUMMARY OF ARGUMENT

Petitioner's argument depends entirely on its erroneous assertion that punitive damages are categorically unavailable under the Jones Act, 46 U.S.C. § 30104. This Court need not address that assertion; it can affirm the decision below on the ground that punitive damages are available in an unseaworthiness action regardless of whether they are available under the Jones Act. But if this Court chooses to reach the issue,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* confirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have granted blanket consent to the filing of *amicus* briefs.

it should affirm the decision below because punitive damages are available under the Jones Act.

1. When Congress incorporated the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, by reference in the Jones Act, it gave injured crewmembers the rights that injured railroad workers have under FELA. Applying the analytic framework that this Court explained in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), punitive damages are available under FELA. That approach is also consistent with this Court's direction in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), to construe FELA by reference to common-law principles when deciding issues that the statute does not explicitly address.

The relevant cause of action—negligence—was well-established at common law. In the years immediately before FELA, this Court upheld several negligence claims by injured railroad employees against their employers.

The remedy at issue—punitive damages—was also well-established before the enactment of FELA, both at common law and under the general maritime law, including in negligence actions. Punitive damages were available in actions against railroads, and punitive damages were awarded against railroads, including in actions for injuries suffered by their employees. In any event, this Court has put the burden on the party seeking to deny a traditional common-law remedy to show that a generally available remedy was unavailable in a particular context. *See Townsend*, 557

U.S. at 414-415, 418. Petitioner cannot carry that burden.

Nothing in FELA deprives injured railroad workers of the right to pursue punitive damages in appropriate cases. On the contrary, Congress's intention was to expand the remedies available to injured railroad workers without depriving them of any remedies that they previously possessed.

This Court has never held that punitive damages are categorically unavailable under FELA. The decisions cited to restrict the right to pursue punitive damages did not involve the issue. Those decisions addressed only compensatory damages in the wrongful-death context, which has a unique history that does not apply in non-fatal personal-injury cases. Lower-court decisions to the contrary are inconsistent with this Court's decisions.

2. Even if punitive damages were unavailable under FELA, they would still be available under the Jones Act. FELA limitations do not limit Jones Act claims when crewmembers have traditionally enjoyed greater rights under the general maritime law. FELA establishes a floor for crewmembers' rights, not a ceiling. This Court has several times recognized situations in which injured crewmembers have greater rights than injured railroad workers. The general maritime law recognized punitive damages before the nation even had railroads.

ARGUMENT

Petitioner Dutra Group advocates a *per se* rule that an injured crewmember can never recover punitive damages under the general maritime law doctrine of unseaworthiness, no matter how egregious a defendant shipowner's fault may be. That extreme rule would apply even if a shipowner made a deliberate, callous decision to send a doomed—but over-insured—rust-bucket to sea because the anticipated insurance proceeds would exceed the compensatory damages payable to any injured sailors who survive the inevitable sinking. Petitioner's argument for such a harsh rule rests entirely on its assertion that punitive damages are categorically unavailable under the Jones Act. But that assertion is incorrect. Properly understood, the Jones Act permits the traditional remedy of punitive damages in an extreme case when the defendant employer has been guilty of sufficiently egregious misconduct. As a result, petitioner's entire analysis collapses.

Neither the Jones Act nor the Federal Employers' Liability Act (FELA), which the Jones Act incorporates by reference, addresses punitive damages. And this Court has never held that punitive damages are unavailable under either statute. Indeed, this Court in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 424 n.12 (2009), explicitly recognized that the availability of punitive damages under the Jones Act remains an open question.

Some lower courts—including the court below—have mistakenly held that punitive damages are unrecoverable under the Jones Act and FELA. *See, e.g.*, *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1454-59 (6th Cir. 1993) (Jones Act); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-561 (9th Cir. 1984) (same); *Wildman v. Burlington Northern Railroad Co.*, 825 F.2d 1392, 1393-95 (9th Cir. 1987) (FELA); *Kozar v. Chesapeake & Ohio Railway Co.*, 449 F.2d 1238, 1240-43 (6th Cir. 1971) (same). This Court need not decide that issue. It may affirm the decision below on the ground that punitive damages would be available in an action for unseaworthiness even if they were not allowed under the Jones Act. That is what the court below held. *See* Pet. App. 3a & n.7. It is essentially how the *Townsend* Court upheld the availability of punitive damages for the willful failure to pay maintenance and cure. *See* 557 U.S. at 424 n.12. But this Court could also resolve the question presented by recognizing that the Jones Act permits the recovery of punitive damages when the defendant employer has been guilty of sufficiently egregious misconduct.

I. Punitive Damages Are Available in Actions Under the Jones Act Because They Are Available Under FELA.

The Jones Act gave crewmembers the right to "maintain an action for damages at law" and provided that "in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." Merchant Marine Act, ch. 250, § 33, 41

Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. § 30104). In *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 391-392 (1924), this Court recognized that Congress had by reference incorporated FELA and its amendments. A proper analysis of the availability of punitive damages under the Jones Act therefore begins with FELA. And because FELA permits an injured railroad worker to recover punitive damages in an appropriate case, that remedy is also available under the Jones Act.

Under the analytical framework that this Court established in *Townsend*, 557 U.S. at 414-415, 420, 424, the test for determining whether an injured railroad worker can seek punitive damages for an employer's egregious fault turns on whether the cause of action (negligence) and the remedy (punitive damages) preexisted FELA, and whether FELA precluded the action or the remedy. *See also, e.g., Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) (construing FELA by reference to common-law principles with respect to issues not explicitly addressed by the statute). All three of the *Townsend* factors point in favor of the continued availability of punitive damages under FELA.

A. Injured railroad employees had both a negligence cause of action and a punitive-damages remedy prior to FELA.

Pre-FELA caselaw demonstrates that the first two requirements—the pre-FELA existence of the cause of action and the remedy—are easily satisfied.

1. Injured railroad workers could bring an action for negligence against their employers prior to FELA.

In the years immediately prior to FELA, this Court regularly recognized that injured railroad workers could bring common-law negligence actions against their employers. In *Santa Fe Pacific Railroad Co. v. Holmes*, 202 U.S. 438 (1906), for example, an engineer injured in a head-on collision recovered for his employer's negligence in sending approaching trains on the same track. In *Texas & Pacific Railway Co. v. Swearingen*, 196 U.S. 51 (1904), an injured switchman recovered for his employer's negligence in placing a scale box too close to the track. And in *Choctaw, Oklahoma & Gulf Railroad Co. v. Holloway*, 191 U.S. 334 (1903), an injured fireman recovered for his employer's failure to equip an engine with brakes.

Prior to FELA, railroads often escaped negligence liability under three harsh common-law rules denying recovery in many typical situations—the fellow-servant rule, the contributory-negligence rule, and the assumption-of-the-risk rule.[2] In *Northern Pacific Railway Co. v. Dixon*, 194 U.S. 338 (1904), for example, a fireman was killed in a head-on collision between two

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[2] In *Holmes*, the railroad asserted the fellow-servant doctrine; in *Swearingen* and *Holloway*, the railroads asserted the assumption-of-the-risk rule; and in all three cases the railroads asserted the contributory-negligence rule. *See Holmes*, 202 U.S. at 438-439; *Swearingen*, 196 U.S. at 53; *Holloway*, 191 U.S. at 337. But the defenses failed on the facts and the injured employees succeeded in their negligence actions.

trains that occurred because a local telegraph operator had negligently informed the dispatcher that one of the trains had not yet passed his station when in fact it had passed the station while the operator was asleep. This Court ruled that "it is obvious that the local operator was a fellow servant with the fireman," *id.* at 343, and thus the railroad was not liable for the fireman's death. *See also, e.g.*, *New England Railroad Co. v. Conroy*, 175 U.S. 323, 327-347 (1899) (fellow-servant rule); *Southern Pacific Co. v. Seley*, 152 U.S. 145, 154-156 (1894) (assumption-of-the-risk rule); *id.* at 156 (contributory-negligence rule) (alternate holding).

2. Punitive damages were generally available prior to FELA.

Although the plaintiffs in *Holmes*, *Swearingen*, and *Holloway* did not seek punitive damages, other pre-FELA cases establish that punitive damages were then available at common law, available under the general maritime law, available in common-law negligence actions, available against railroads, and in fact awarded against railroads (including in actions for injuries to railroad employees).

a. Punitive damages were available at common law prior to FELA.

This Court in *Townsend* documented that "[p]unitive damages have long been an available remedy at common law." 557 U.S. at 409 (citing U.S. and English cases dating back to colonial times). Indeed, before the enactment of FELA, this Court itself recognized the general availability of punitive damages. In *Day v.*

Woodworth, 54 U.S. (13 How.) 363 (1852), for example, this Court explained:

> It is a well-established principle of the common law, that in . . . all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.

Id. at 371; *see also, e.g.*, *Barry v. Edmunds*, 116 U.S. 550, 562 (1886) ("[A]ccording to the settled law of this court, [a plaintiff] might show himself, by proof of the circumstances, to be entitled to exemplary damages calculated to vindicate his right and protect it against future similar invasions.").

This Court similarly recognized punitive damages as an available remedy under the general maritime law (itself a form of common law) even earlier. Justice Story, writing for the Court in *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818), described "exemplary damages" as "the proper punishment which belongs to [gross and wonton] lawless misconduct." *Id.* at 558; *see also, e.g.*, *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101, 108 (1893) (recognizing that "courts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages").

b. Punitive damages were available in negligence actions prior to FELA.

The availability of punitive damages was not limited to cases of intentional misconduct, as in *Day v. Woodworth* and *The Amiable Nancy*. This Court's pre-FELA cases also recognized that punitive damages were available in appropriate cases in which the plaintiff had brought a negligence action. In *Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489 (1876), for example, this Court explicitly noted that the punitive-damages rule it had recognized in *Day v. Woodworth* "is equally applicable to suits for personal injuries received through the negligence of others" if the defendant's misconduct was serious enough. 91 U.S. at 493.

c. Punitive damages were available against railroads prior to FELA.

Railroads were regularly subject to the general rule recognizing the availability of punitive damages. In *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101 (1893), a passenger sued a railroad for unlawful arrest, and the jury awarded punitive damages. This Court explained that the availability of punitive damages was "well settled":

> In this court, the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice

> as implies a spirit of mischief or criminal indifference to civil obligations.

Id. at 107. Not only did *Prentice* itself involve an action against a railroad, but the Court cited eight of its prior decisions in support of the quoted proposition—and five of them were actions against a railroad. *See, e.g., Arms*, 91 U.S. at 492 ("well settled . . . that exemplary damages may in certain cases be assessed"); *Philadelphia, Wilmington & Baltimore Railroad Co. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1859) ("Whenever the injury complained of has been inflicted maliciously or wantonly . . . the jury are not limited to the ascertainment of a simple compensation for the wrong. . . .").

d. Punitive damages were in fact awarded prior to FELA in actions against railroads.

The railroads' exposure to punitive damages in the pre-FELA era was not an abstract principle. The courts in fact ordered railroads to pay punitive damages in appropriate cases. In *Fell v. Northern Pacific Railway Co.*, 44 F. 248, 252-253 (C.C.D.N.D. 1890), for example, the court upheld a jury verdict awarding punitive damages to a passenger who had been forced to jump from a moving train. In *Brown v. Memphis & Charleston Railroad Co.*, 7 F. 51, 63-64 (C.C. W.D. Tenn. 1881), the court upheld a jury verdict awarding punitive damages to a passenger who had wrongfully been excluded from the "ladies' car." And in *Denver & Rio Grande Railway Co. v. Harris*, 122 U.S. 597, 609-610 (1887), this Court affirmed an award that included "punitive or exemplary damages." *Cf. Missouri Pacific Railway Co. v.*

Humes, 115 U.S. 512, 522-523 (1885) (affirming an award of statutory double damages as analogous to punitive damages).

e. Punitive damages were in fact awarded prior to FELA in actions against railroads for injuries suffered by railroad employees.

Prior to the enactment of statutory regimes obligating employers to pay compensation to injured employees, there was no conceptual distinction between employees' tort actions against the railroads that employed them and actions by other plaintiffs against those railroads. With the enactment of FELA, of course, employees had a unique statutory remedy against their employers, unhampered by the harsh defenses that had so often denied recovery under the common law. *See supra* at 7-8 & n.2.[3] But until FELA entered into force, an employee's action against a railroad was subject to the same principles as applied in *Fell*, *Brown*, and *Harris* (discussed in the previous paragraph).

Despite the harsh common-law defenses that made it particularly difficult for injured railroad employees to recover even compensatory damages prior to

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[3] In other contexts, employees were eventually covered by workers' compensation regimes that limited their ability to bring tort actions against their employers. *See, e.g.*, Longshore and Harbor Workers' Compensation Act § 5(a), 33 U.S.C. § 905(a) (providing that an employer's liability under the statute "shall be exclusive and in place of all other liability of such employer to the employee") (originally enacted in 1927).

FELA,[4] some plaintiffs succeeded in obtaining a punitive-damages award against a railroad for injuries suffered by an employee. In *Turner v. Norfolk & Western Railroad Co.*, 40 W. Va. 675, 22 S.E. 83 (1895), for example, a 16-year-old railroad employee was killed when an engine collided with the hand car on which he was riding. On appeal, West Virginia's highest court upheld the award, explaining "that the measure of damages in the case of a man's death is not limited to the pecuniary value of his life to his estate; but may be exemplary, punitive, and given as a solatium." 22 S.E. at 87. *See also, e.g.*, *Brickman v. Southern Railway*, 74 S.C. 306, 54 S.E. 553, 557 (1906) (affirming a jury verdict that included punitive damages for the death of a railroad employee in a train wreck); *cf. Ennis v. Yazoo & Mississippi Valley Railroad Co.*, 118 Miss. 509, 79 So. 73, 74-75 (1918) (upholding a jury verdict that apparently included punitive damages for the death of a railroad employee—and explicitly approving the jury instruction authorizing an award of punitive damages—in a case that was not subject to FELA and was accordingly governed by pre-FELA law).

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[4] *See supra* at 7-8 & n.2 (discussing the common-law defenses). Although the contributory-negligence rule could apply in virtually any context, the assumption-of-the-risk rule was more likely to apply in the workplace context and the fellow-servant rule by its nature was a workplace doctrine.

f. In any event, the burden is on petitioner to show that an otherwise generally available remedy such as punitive damages was not available in this context.

Even if the availability of punitive damages against railroads had not been so well-established prior to FELA, this Court in *Townsend* put the burden on the party seeking to deny a traditional common-law remedy to show that the remedy was unavailable in a particular context. *See* 557 U.S. at 414-415, 418. It is accordingly petitioner's burden to prove that railroad workers' cases were an exception to the general rule permitting punitive damages. The cases discussed and cited above make it impossible for petitioner to carry that burden.

B. Congress enacted FELA to expand the rights and remedies available to injured railroad workers without limiting the rights and remedies previously available to them.

The third *Townsend* element—whether FELA precluded the cause of action or the remedy—requires attention to FELA itself. The statute's primary purpose was to expand the negligence action by eliminating the harsh defenses that so often denied recovery, *see supra* at 7-8 & n.2, and by creating a federal wrongful-death cause of action for railroad workers. Three sections of the Act accomplish those goals. Section 1, 45 U.S.C. § 51, expanded the common law in two ways. It eliminated the fellow-servant rule, which had allowed

employers to escape liability "for injuries sustained by one employee through the negligence of a coemployee," S. Rep. No. 60-460, at 1 (1908). And it provided that railroads engaged in interstate commerce "shall be liable in damages . . . , in case of the death of [an injured] employee, to his or her personal representative." Section 3, 45 U.S.C. § 53, modified the contributory-negligence rule, under which a plaintiff's negligence had been a complete bar to recovery, and instead provided that "damages shall be diminished . . . in proportion to the amount of negligence attributable to [the] employee." *See, e.g.*, S. Rep. No. 60-460, at 2 ("It is the purpose of this measure to modify the law of contributory negligence."). Finally, section 4, 45 U.S.C. § 54, eliminated the assumption-of-the-risk rule, which had allowed employers to avoid liability if the employee had accepted the job with knowledge of the unsafe work conditions.[5]

When enacting FELA to give *greater* rights and remedies to injured railroad workers who sued their employers for negligence, Congress did not intend to deprive injured workers of any of the rights and remedies that they had already enjoyed under the common law prior to FELA. The Senate Judiciary Committee

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[5] FELA originally eliminated the assumption-of-the-risk defense only when "the violation . . . of any statute enacted for the safety of employees contributed to the injury or death of such employee." Act of Apr. 22, 1908, ch. 149, § 4, 35 Stat. 65, 66. Then, in 1939, Congress completely eliminated the defense. Act of Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404, 1404.

explained that point emphatically in the course of describing the proposed 1910 amendments to FELA:

> In considering the advisability of amending [the original FELA of 1908], it is important at the outset to understand that the purpose of Congress in the passage of this act was to extend further protection to employees. This was its manifest purpose, as is apparent from a consideration of the circumstances of its enactment. It is manifest from a consideration of the reports, both of the Senate and House committees, when the measure was pending before those bodies prior to its enactment, that the purpose of the statute was to extend and enlarge the remedy provided by [the common] law to [railroad] employees. . . . *No purpose or intent on the part of Congress can be found to limit or to take away from such an employee any right theretofore existing by which such employees were entitled to a more extended remedy than that conferred upon them by the act.*

S. Rep. No. 61-432 (1910), *reprinted in* 45 Cong. Rec. 4040, 4044 (1910) (emphasis added).

Congress intended not only to provide more compensation to railroad workers but also to "greatly lessen personal injuries. . . ." H.R. Rep. No. 60-1386, at 2 (1908). During the late nineteenth century, railroad work was extraordinarily dangerous.[6] "In 1888 the

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[6] Although conditions have improved, railroad work remains dangerous. *See, e.g.*, Dino Drudi, *Railroad-Related Work Injury Fatalities*, MONTHLY LAB. REV., July/Aug. 2007, at 17 (*available*

odds against a railroad brakeman's dying a natural death were almost four to one," and "the average life expectancy of a switchman in 1893 was seven years." *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 3 (1964). President Benjamin Harrison called it "a reproach to our civilization" that rail workers were "subjected to a peril of life and limb as great as that of a soldier in time of war." *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 19 (1904). Congress accordingly sought to induce railroads "to exercise the highest degree of care . . . for the safety of [all employees] in the performance of their duties." H.R. Rep. No. 60-1386, at 2. Congress would have recognized that the threat of punitive damages for egregious misconduct contributed to those goals, for it was understood then (as now) that one of the purposes of punitive damages is to "teach the tort feasor the necessity of reform." *McGuire v. The Golden Gate*, 16 F. Cas. 141, 143 (No. 8,815) (C.C.N.D. Cal. 1856). The threat of both punitive and compensatory damages provides a greater incentive for railroads to operate safely than would the threat of compensatory damages alone.

It is implausible that Congress, in its effort to provide incentives for railroads to improve safety standards, would eliminate *sub silentio* a well-established common-law remedy that created a powerful incentive to improve safety standards. In *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488-489 (2008), this Court

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at http://www.bls.gov/opub/mlr/2007/07/art2full.pdf) (noting that railroad industry has "fatal injury rate more than twice the all-industry rate").

addressed essentially the same situation. When Exxon—relying on *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (en banc)—argued that the penalties for water pollution under section 311 of the Clean Water Act, 33 U.S.C. § 1321, displaced its liability to pay punitive damages following the *Valdez* spill, this Court summarily (and unanimously) rejected the argument:

> [W]e find it too hard to conclude that a statute expressly geared to protecting "water," "shorelines," and "natural resources" was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals.

554 U.S. at 488-489. It is, if anything, even harder to conclude that FELA, a statute expressly geared to protecting railroad workers and improving their remedies, was intended to eliminate *sub silentio* the railroads' corresponding liability to pay punitive damages for the breach of their common-law duties to refrain from injuring their employees.

C. This Court has never held that punitive damages are categorically unavailable under FELA.

This Court has never addressed the availability of punitive damages under FELA. Lower courts that have denied their availability in FELA cases have directly or indirectly relied primarily on three decisions: *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59

(1913); *American Railroad Co. v. Didricksen*, 227 U.S. 145 (1913); and *Gulf, Colorado & Santa Fe Railway Co. v. McGinnis*, 228 U.S. 173 (1913).[7] None of those cases involved punitive damages (or even used the words "punitive" or "exemplary"). Indeed none of them was even a personal-injury case; all three were wrongful-death cases in which the analysis turned on the unique history of wrongful-death statutes.

The *Vreeland* Court distinguished between survival and wrongful-death actions, *see* 227 U.S. at 65-70, and held that—in a wrongful-death action—the widow of a railroad worker killed in the railroad's service could not recover loss-of-society damages because wrongful-death statutes historically did not permit such damages, *id.* at 70-71.

In *Didricksen*, decided a week after *Vreeland*, the Court again distinguished between survival and wrongful-death actions, *see* 227 U.S. at 149, and held (following *Vreeland*) that the surviving parents of a railroad worker fatally injured in the service of the railroad could not recover loss-of-society damages in their wrongful-death action, *id.* at 149-150.

McGinnis (following *Vreeland* and *Didricksen* later in the same Term) held that the non-dependent child of an engineer killed in a derailment could not recover compensatory damages in a wrongful-death action. *See* 228 U.S. at 174-176. The rationale again turned on the unique history of wrongful-death

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[7] *See, e.g., Wildman*, 825 F.2d at 1394; *Kozar*, 449 F.2d at 1241-42.

statutes—a history that has no relevance to whether injured plaintiffs suing for their own damages may claim a well-established remedy such as punitive damages.

The key paragraph in the *Vreeland* opinion explained the reasoning on which the subsequent decisions all depended:

> The word "pecuniary" did not appear in Lord Campbell's Act, nor does it appear in our act of 1908 [FELA]. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.

227 U.S. at 71. "Lord Campbell's Act" is the Fatal Accidents Act 1846, 9 & 10 Vict. c. 93 (U.K.), the original wrongful-death statute in the Anglo-American legal world that responded to the common law's failure to provide a wrongful-death remedy.

Two conclusions follow from the quoted reasoning, one self-evident and one less obvious. The self-evident conclusion is that the *Vreeland* Court based its analysis entirely on the special history of wrongful-death statutes. It concluded that FELA's wrongful-death provision disallowed non-pecuniary damages based solely on the premise that Lord Campbell's Act "and all those which follow it" had disallowed non-pecuniary damages. The Court said nothing about the remedies available for non-fatal personal injuries, a field in which a long history of common-law remedies leads to a very different analysis.

The less obvious conclusion is that the *Vreeland* Court must have been addressing only compensatory damages, and had nothing to say about punitive damages (even in the wrongful-death context). Because the underlying premise of the reasoning was that certain types of damages were unavailable under all of the state wrongful-death statutes, the *Vreeland* Court could only have been referring to those types of damages that were universally unavailable under state wrongful-death statutes at the time of the decision. That category does not include punitive damages, which were then available in wrongful-death actions in a number of states.[8] For example, this Court, less

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[8] In addition to South Carolina, which is discussed in the text, some of the other states that permitted the recovery of punitive damages under their wrongful-death statutes were Alabama, *see Savannah & Memphis Railroad Co. v. Shearer*, 58 Ala. 672, 680 (1877) (affirming a punitive-damages award under the wrongful-death statute); Arkansas, *see St. Louis, Iron Mountain & Southern Railway Co. v. Roberson*, 103 Ark. 361, 146 S.W. 482, 485 (1912) (affirming a punitive-damages award for the death of a passenger); Kentucky, *see Louisville & Nashville Railroad Co. v. Kelly's Administratrix*, 100 Ky. 421, 38 S.W. 852, 854 (1897) (holding that the law "extend[ed] the common-law right of action to recover both compensatory and exemplary damages for [non-fatal] injuries . . . to cases in which death ensued"); Missouri, *see Parsons v. Missouri Pacific Railway Co.*, 94 Mo. 286, 6 S.W. 464, 468 (1888) ("[T]wo elements of damage are to be considered by the jury,—compensation . . . , and punishment to the wrong-doer when the circumstances attending the wrongful act, neglect, or default are such as to warrant it."); Montana, *see Olsen v. Montana Ore Purchasing Co.*, 35 Mont. 400, 89 P. 731, 734 (1907) (holding that a general statute authorizing punitive damages applies in an action under the wrongful-death statute); Nevada, *see Benner v. Truckee River General Electric Co.*, 193 F. 740, 741 (C.C.D. Nev. 1911) (quoting the Nevada wrongful-death statute

than three years after its decision in *Vreeland*, described S.C. Civil Code § 3956 (1912) as "a statute in South Carolina similar to Lord Campbell's Act." *Seaboard Air Line Railway v. Koennecke*, 239 U.S. 352, 353 (1915). That statute explicitly authorized "the jury [to] give such damages, including exemplary damages where [the defendant's] wrongful act, neglect or default was the result of recklessness, willfulness or malice, as they may think proportioned to the injury." *See also, e.g.*, *Brickman*, 54 S.E. at 556, 557 (affirming a jury verdict that included punitive damages under S.C. Civil Code § 2852 (1902), "the statute commonly known as 'Lord Campbell's Act,'" which was substantially the same as § 3956 in the 1912 Code, for the death of a railroad employee in a train wreck).

The strongest support that petitioner and its supporting *amici* could find to bolster their assertion that this Court has disapproved of punitive damages under FELA is *Koennecke*, 239 U.S. at 354.[9] *See* Pet. Br. 18;

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authorizing an award of "exemplary" damages); South Dakota, *see Moberg v. Scott*, 42 S.D. 372, 175 N.W. 559, 561 (1919) (affirming a punitive-damages award under the wrongful-death statute); Tennessee, *see Union Railway Co. v. Carter*, 129 Tenn. 459, 166 S.W. 592, 593 (1914) (holding that "exemplary damages . . . are recoverable in suits founded on [the wrongful-death] statute"); and West Virginia, *see Turner v. Norfolk & Western Railroad Co.*, 40 W. Va. 675, 22 S.E. 83, 87 (1895) (affirming a punitive-damages award for the death of a railroad employee).

[9] Petitioner also argues that respondent "recognizes that [punitive damages] are not available" under the Jones Act because he "did not even request punitive damages for the Jones Act negligence claim in his complaint." Pet. Br. 17 n.3. (Petitioner actually says that "petitioner" did not request punitive damages, but

Inland River Harbor and Fleeting Coalition Br. 6; Waterways Council Br. 10. The issue in the purportedly relevant portion of that opinion is whether a state court violated a defendant's due-process rights when it permitted a plaintiff to amend her ambiguous complaint in the middle of trial to specify that she was suing under FELA rather than the state's wrongful-death statute. *See* 239 U.S. at 354. FELA § 1 limits wrongful-death benefits in some situations to family members of the deceased railroad employee who were "dependent upon such employee," while the state statute imposed no dependency requirement. On the other hand, S.C. Civil Code § 3956 (1912), quoted above, explicitly authorized "exemplary damages," while FELA is silent on the availability of punitive or exemplary damages. The Court explained the ambiguity of the complaint by reference to those provisions:

> If [the complaint] were read as manifestly demanding exemplary damages, that would point to the state law, but the allegation of dependence was relevant only under the act of Congress.

239 U.S. at 354. Whatever that sentence means, it cannot be a holding that punitive damages are unavailable under FELA. It is unclear whether the

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that is an obvious typographical error. Petitioner clearly intended to say "respondent.") It is far more likely that respondent recognized only that *Kopczynski*, 742 F.2d at 560-561, a binding Ninth Circuit decision, had held that punitive damages are unavailable under the Jones Act, and made a strategic decision not to seek a remedy that neither the district court nor a three-judge panel of the court of appeals had the power to grant.

Koennecke plaintiff even requested punitive or exemplary damages; in any event, the availability of punitive damages was not before this Court. The Court may have meant simply that if the plaintiff had requested "exemplary damages" it could have suggested reliance on the state statute that explicitly authorizes "exemplary damages" (while saying nothing about whether they might also be available under FELA). That would be consistent with the reference to "the allegation of dependence." The Court believed that the dependency reference suggested reliance on FELA because FELA explicitly requires dependency in some circumstances, but that does not mean that dependents were barred from recovery under the state statute.[10] And even if the quoted sentence could be read to offer a subtle clue about the availability of punitive damages under FELA, it is important to recall that *Koennecke* was a wrongful-death case. Any clues that it might provide in that context would have little relevance in the context of workers suing to recover for their own injuries.

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[10] The South Carolina Supreme Court, in the decision that this Court was reviewing, made that point explicitly:

> The allegation of the complaint that deceased left a widow and four children, who were dependent upon him, is appropriate to an action under the federal statute; and, while the allegation of dependency is not strictly necessary, it is not wholly inappropriate to an action under the state statute. . . .

Koennecke v. Seaboard Air Line Railway, 101 S.C. 86, 85 S.E. 374, 375, *aff'd*, 239 U.S. 352 (1915).

D. Lower courts have erred in holding that punitive damages are categorically unavailable under FELA.

Because *Townsend*'s three requirements are satisfied, injured railroad workers are entitled to seek punitive damages under FELA. Lower courts' decisions to the contrary are simply wrong.

The mistaken interpretation began in the Sixth Circuit, which vacated a $70,000 punitive-damages award to the widow of a railroad employee who was killed when a 40-ton railroad car was negligently dropped on him. *See Kozar*, 449 F.2d at 1239. *Kozar* was decided before *Townsend* and *Gottshall*, so the Sixth Circuit did not have the benefit of this Court's teachings in either of those subsequent cases, and thus it did not conduct the analysis that would have led it to the opposite conclusion. *Cf. supra* at 6-18 (applying the *Townsend* analysis to demonstrate why punitive damages are available under FELA). But even at the time *Kozar* was decided, its reasoning was flawed.

The *Kozar* court's first reason for rejecting the punitive-damages award starkly illustrates its inconsistency with *Townsend*. Although it correctly recognized that FELA's "provisions were not to limit or take away any 'remedy' available at common law to an injured employee," 449 F.2d at 1240; *cf. supra* at 14-18, it nevertheless vacated the district court's punitive damages judgment because it believed that "the right to recover punitive damages at common law" was not "a 'common law remedy,'" *id.* That belief is flatly

inconsistent with *Townsend*, in which this Court explicitly described punitive damages as "an available remedy at common law," 557 U.S. at 409; "an available maritime remedy," *id.* at 411, 412 n.2; a "remedy . . . well established before the passage of the Jones Act," *id.* at 420; a "general maritime remedy," *id.* at 422; and "an accepted remedy under general maritime law," *id.* at 424. Simply put, *Townsend* precludes the argument that punitive damages are not a "remedy."

The *Kozar* court also relied heavily on a misreading of *Vreeland*, *Didricksen*, and *McGinnis*. *See supra* at 18-22. As noted, the *Vreeland* Court was discussing compensatory damages, not punitive damages. *See supra* at 21-22. And even if *Vreeland* had limited the availability of punitive damages under FELA's wrongful-death provisions—an issue that this Court never addressed—the case would still have no relevance to FELA's provisions governing non-fatal personal injuries, *see supra* at 20, and thus no relevance to this case.

Subsequent decisions denying punitive damages under FELA rely, either directly or indirectly, on *Kozar* and the cases that the Sixth Circuit cited in *Kozar*. The Ninth Circuit in *Wildman*, for example, relied primarily on *Kopczynski*, 742 F.2d at 560-561, which held that punitive damages are categorically unavailable under the Jones Act, and on *Kozar*. *See Wildman*, 825 F.2d at 1394-95. *Kopczynski*, in turn, relied primarily on *Vreeland*, *McGinnis*, and *Kozar*. *See* 742 F.2d at 560-561.

Two examples from *Wildman* illustrate the most blatant inconsistencies with *Townsend*. First, *Wildman* applied the "least common denominator" approach that *Townsend* rejects, 557 U.S. at 424, reasoning that by failing to authorize punitive damages FELA had silently prohibited them. *See Wildman*, 825 F.2d at 1394-95. In that regard, *Wildman* also ignored the established rule that "'to abrogate a common-law principle, a statute must speak directly to the question addressed by the common law.'" *Exxon Shipping*, 554 U.S. at 489 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)); *cf. Miles*, 498 U.S. at 31 (recognizing Congress's power when "Congress has spoken directly to the question"). Second, the *Wildman* plaintiff (anticipating *Townsend*) argued "that punitive damages were available at common law prior to the enactment of the FELA, and that it was Congress's expressed intent in enacting the law not to limit any existing remedies," which meant that punitive damages were still available. 825 F.2d at 1394. The *Wildman* court, repeating one of *Kozar*'s mistakes, rejected that argument because "'the right to recover punitive damages at common law'" was not "'a "common law remedy,"'" *id.* (quoting *Kozar*, 449 F.2d at 1240). *See supra* at 25-26.

The only other lower-court case that petitioner cites for the proposition that punitive damages are unavailable under FELA, *see* Pet. Br. 17-19 & n.6, is *Miller*, 989 F.2d at 1457, a Sixth Circuit wrongful-death case holding that punitive damages are unavailable under the Jones Act on the ground that they are

unavailable under FELA. The *Miller* court, however, merely cites *Kozar* with no independent analysis of the issue. The opinion instead focuses on whether punitive damages are available under the Jones Act, basing its reasoning on the (incorrect) assumption that they are unavailable under FELA. *See* 989 F.2d at 1457-60.

None of the cited cases are sufficient to justify the categorical prohibition of punitive damages that petitioner advocates.

II. Even If Punitive Damages Were Unavailable Under FELA, They Are Still Available Under the Jones Act.

Jones Act crewmembers have at least the same rights that railroad workers have under FELA. But the FELA-Jones Act linkage is not universally true. This Court has recognized that FELA's limitations do not always constrain crewmembers; in some situations, they and their families have greater rights. *Townsend*, which upheld the right to seek punitive damages for the "willful and wanton disregard of the maintenance and cure obligation," 557 U.S. at 424, offers a particularly relevant example. Injured railroad workers may not seek punitive damages in that context because they are not entitled to maintenance and cure in the first place. Similarly, in *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 374-375 (1932), this Court held that crewmembers can sue under the Jones Act for the negligent withholding of maintenance and cure—even though FELA does not give that right to railroad workers.

The *Townsend/Cortes* example is not unique. Until 1939, FELA eliminated the assumption-of-the-risk defense only when the violation of a safety statute contributed to the injury or death. *See supra* at 15 & n.5. In *The Arizona v. Anelich*, 298 U.S. 110, 120-123 (1936), however, this Court recognized that crewmembers have greater rights under the unseaworthiness doctrine, and thus were not subject to the assumption-of-the-risk defense when an unseaworthy condition contributed to the seaman's death.[11] The Court explained:

> The [Jones Act] was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. Its provisions . . . are to be liberally construed to attain that end, and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part.

Id. at 123 (citations omitted). Because maritime law prior to the Jones Act did not recognize the assumption-of-the-risk defense in unseaworthiness actions and "[n]o provision of the Jones Act is inconsistent with the admiralty rule," this Court would not assume "that Congress intended, by [the Jones Act's] adoption, to modify that rule by implication." *Id.* In other words, FELA establishes a floor for crewmembers, not a

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[11] *Anelich*'s status as a fatal-injury case is particularly telling. The Court explicitly recognized that the plaintiff, as the administratrix of the deceased crewmember's estate, would have had no cause of action prior to the Jones Act. *See* 298 U.S. at 118. But *Anelich* still held that her rights were not limited by FELA. *See id.* at 123-124.

ceiling. They are guaranteed at least the rights that FELA grants to railroad workers, but in some contexts they have greater rights under maritime law. Asserting rights under the general maritime law's warranty of seaworthiness is one example of such a context.

This Court confirmed the principle that FELA establishes a floor, not a ceiling, in *Cox v. Roth*, 348 U.S. 207 (1955), which held that the death of an individual employer does not defeat a Jones Act claim even though FELA does not provide for the survival of actions against deceased tortfeasors. The *Cox* Court explained:

> The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting.

Id. at 209. This Court accordingly rejected the approach that a plurality opinion of the Fifth Circuit later adopted in *McBride v. Estis Well Service*, 768 F.3d 382 (5th Cir. 2014) (en banc), which lifted the word "pecuniary" from *Vreeland*'s "gloss on FELA" in the wrongful-death context and applied it mechanically to the Jones Act personal-injury context. *See also Baptiste v. Superior Court*, 106 Cal. App. 3d 87, 102, 164 Cal. Rptr. 789, 797 (1980) ("FELA precedents do not

constitute a bar to punitive damages in Jones Act cases" because "the kinship of railway workers and seamen, as perceived by Congress, should not lead to overly literal or rigid transplanting of principles from land to sea.").

Because nothing in FELA suggests that Congress intended to deny injured railroad workers the right to seek punitive damages from a railroad, *see supra* at 6-28, this case presents a typical situation in which an injured plaintiff's rights are the same under FELA and the Jones Act. But even if FELA did prohibit punitive damages, they would still be available under the Jones Act. Punitive damages are even more firmly established in maritime law. Indeed, the general maritime law recognized the availability of punitive damages before the nation even had railroads. *See The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818).

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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No. 18-266

In the Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE THE INLAND RIVER HARBOR AND FLEETING COALITION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Inland River Harbor and Fleeting Coalition ("The Coalition") is an association of companies that operate on the Inland or Western Rivers of the United States. The Coalition is made up of Evansville Marine Service, Inc., JB Marine Service, Inc., Osage Marine Services, Inc., Upper River Services, L.L.C., and Wepfer Marine, Inc. The Coalition works together to address certain issues that are common to their segment of the maritime industry.

Collectively, the companies of The Coalition operate approximately 100 commercial vessels, which are crewed by many hundreds of seamen. These vessels and seamen work regularly in at least nine states: Arkansas, Illinois, Indiana, Kentucky, Minnesota, Missouri, Mississippi, Tennessee, and Wisconsin. As a whole, the domestic maritime industry moved 873,100,000 short tons of cargo in 2017. The important work performed by the companies of The Coalition is one crucial link in America's network of river transportation. As such, The Coalition is uniquely positioned to inform this Court about several key aspects of the legal issue presented in this case.

This is the first time The Coalition has filed an Amicus Curiae Brief. The Coalition is interested in the issue before the Court as each of its members are routinely involved in defending unseaworthiness and

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties have filed a blanket consent to amicus curiae briefs.

other maritime claims. The stakes of this decision are enormous for The Coalition and the country's entire maritime industry. For the reasons set forth below, The Coalition supports Petitioner and urges the Court to reverse the decision of the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

Respondent asks this Court to permit the recovery of punitive damages for unseaworthiness in contravention of the tort recovery system Congress created for seamen. Doing so requires setting aside this Court's precedents and disregarding the policy judgments of Congress. Moreover, affirming the Ninth Circuit's decision will create several anomalies harmful to the constitutionally-mandated uniformity of maritime law.

In 1920, Congress enacted the Jones Act, 46 U.S.C. § 30104, which authorized seamen to recover against their employers for negligence. A seaman's recovery for negligence under the Jones Act is limited to pecuniary losses. In 1990, this Court held that the Jones Act's bar on the recovery of non-pecuniary damages in a seaman's negligence action meant that the recovery of non-pecuniary damages was similarly barred in an unseaworthiness suit for a seaman's wrongful death. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). In *Miles*, a unanimous Court reasoned that it would be inconsistent with the Court's Constitutional role to sanction a more expansive remedy for the judicially-created cause of action for unseaworthiness than the

remedies Congress had sanctioned in the Jones Act. Under *Miles*, Respondent should likewise be barred from recovering punitive damages for unseaworthiness.

The Supreme Court's 2009 decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009) is distinguishable and does not change the outcome dictated by *Miles* and this Court's pre-*Miles* unseaworthiness decisions. In *Townsend*, the Court held that punitive damages were an available remedy to seamen for an employer's willful failure to pay maintenance and cure. However, such claims are contractual obligations arising out of a seaman's employment. In authorizing this remedy, the Court reasoned that both the claim (maintenance and cure) and remedy sought (punitive damages) were well-established in the law when the Jones Act was enacted in 1920. The same cannot be said of Respondent's unseaworthiness claim. To the contrary, the strict liability unseaworthiness claim asserted by Respondent sounds in tort and was first recognized after 1920. Unseaworthiness previously referred to a fault-based claim concerning whether the shipowner exercised due diligence. This Court has repeatedly held—both before and after 1920—that the remedy for a breach of the duty of seaworthiness is compensatory damages. This Court has never approved punitive damages for a breach of the duty of seaworthiness and, applying the rationale of *Miles* and *Townsend*, it should not do so now.

Congress's policy decision against the availability of punitive and other non-pecuniary damages for maritime workers is evident in the ordered system of tort recovery that Congress created in three statutes

in the 1920s: The Jones Act, the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301–30308, and the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901–950. Together, these three statutes govern the statutory tort remedies available to maritime workers. None of these statutes permit the recovery of punitive damages. Congress has further occupied this field by comprehensively regulating vessel seaworthiness through a system of inspections and certifications for most commercial vessels. This Court's precedents caution against the creation of more expansive remedies for judge-made general maritime claims than statutory claims. In addition, punitive damages are not a necessary remedy for unseaworthiness since vessels are already thoroughly regulated by Congress and operators have strong financial incentives to avoid unseaworthy vessels. Moreover, unseaworthiness and negligence are "Siamese Twins" in maritime law. This Court should not recognize punitive damages as a remedy for unseaworthiness when Congress has made a policy decision against such damages for its "Siamese Twin" (Jones Act negligence).

A ruling in Respondent's favor would undermine a fundamental purpose of maritime jurisdiction: the fostering of a uniform maritime law whose nationwide predictability encourages and safeguards maritime commerce. The holding below introduces several harmful anomalies into maritime tort law. First, because no federal maritime law rule governs the insurability of punitive damages and because not all states allow punitive damages to be covered by insurance, vessel operators and their insurers would be confronted with an unequal patchwork of varying state laws that will disrupt interstate commerce. Second, if

this Court overrules *Miles* in holding for Respondent, the availability of punitive damages for a seaman's wrongful death on the high seas (covered exclusively by DOHSA) would depend on an arbitrary geographic test whether the seaman was more or less than three nautical miles away from the Coast. Third, if this Court does not overrule *Miles* but instead limits the holding in *Miles* to wrongful death, a seaman's unseaworthiness claim for personal injury would inexplicably permit greater recovery than a wrongful death claim arising out of the same unseaworthy condition. This Court should stand by the uniform rule set forth in *Miles* and avoid the creation of these anomalies in the maritime law.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN CONCLUDING THAT SEAMEN MAY RECOVER PUNITIVE DAMAGES FOR A BREACH OF THE DUTY OF SEAWORTHINESS.

A. Congress Has Limited Seamen's Tort Recoveries Under the Jones Act to Pecuniary Losses, Which Exclude Punitive Damages.

Congress "has paramount power to determine the maritime law which shall prevail throughout the country." *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 43 (1934). In passing the Jones Act in 1920, Congress extended to seamen the same claim and remedy that were available to railroad workers under the Federal Employers Liability Act (FELA). Under both the FELA and the Jones Act, it is settled that

the remedy Congress provided is limited to recovering "pecuniary" losses. *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913); *Miles*, 498 U.S. 19, 32 (1990). Congress's choice to exclude recovery of non-pecuniary losses under the Jones Act supports a similar prohibition against recovering punitive damages for an unseaworthiness claim.

Because punitive damages are not pecuniary in nature, the law has barred their recovery under both the FELA and the Jones Act. *Seaboard Air Line Ry. v. Koennecke*, 239 U.S. 352, 354 (1915) (a complaint requesting punitive damages points to state law rather than the FELA as the basis for the claim); *Miles*, 498 U.S. at 32 ("Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well.").

This Court has never approved an award of punitive damages for an injury or death under the Jones Act or the FELA. The Ninth Circuit's decision below acknowledges that punitive damages are unavailable under the Jones Act. *Batterton v. Dutra Group*, 880 F.3d 1089, 1092 (9th Cir. 2018) ("'[p]unitive damages are non-pecuniary' and so are not allowable under the Jones Act") (*quoting Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984)).

In 1990, this Court addressed whether two categories of non-pecuniary damages—loss of society and lost future earnings—could be recovered under general maritime law for the death of a seaman caused by unseaworthiness.[2] To answer these questions, the

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[2] The district court had already dismissed the seaman's claim for punitive damages. *Miles*, 498 U.S. at 22.

Court was guided by the Jones Act's pecuniary limitation on damages, noting:

> We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.

Miles, 498 U.S. at 27.

Because the Jones Act limits recovery to pecuniary damages, this Court unanimously held that loss of society was unavailable in a general maritime law unseaworthiness claim for wrongful death. *Id.* at 32-33. On this point, the Court reasoned:

> It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence.

Id. at 32-33; *see also Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623 (1978) (there is no occasion to supplement maritime damages when "Congress has struck the balance for us").[3]

Miles similarly barred recovery for lost future earnings since allowing such a recovery would go "well beyond the limits of Congress' ordered system of recovery for seamen's injury and death." 498 U.S. at 36. Because Miles' representative could not recover for his lost future earnings under the Jones Act, this Court held the representative could likewise not do so under the general maritime law. *Id.*

Despite the Jones Act's bar on recovering non-pecuniary damages and this Court's decision in *Miles*, the Ninth Circuit authorized Respondent to seek recovery of punitive damages for unseaworthiness. The Ninth Circuit's decision cannot be reconciled with this Court's rulings in *Miles*. *See* 1 T. Schoenbaum, *Admiralty and Maritime Law* § 5:10 (6th ed. 2019) ("Thus, it appears that *Miles* applies to exclude the recovery of punitive damages by Jones Act seamen in suits against their employers or a vessel for unseaworthiness. But is this holding compatible with

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[3] *Miles* presented these issues in the context of a seaman's wrongful death. However, *Miles* does not present any reason why the Jones Act's pecuniary limitation on damages does not apply equally to non-fatal claims as well. *See also McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 388 (5th Cir. 2014) (en banc) ("no one has suggested why [*Miles*'] holding and reasoning would not apply to an injury case"). A contrary rule would create the anomalous and unjust result that a non-fatal injury would allow recovery for more categories of damages than a death claim. *McBride*, 768 F.3d 382.

[the Court's 2009 decision in] *Townsend*? The answer to this question is yes, on several grounds.").[4]

B. Unlike the Maintenance and Cure Claim in *Townsend*, There Is No Historical Tradition of Punitive Damage Awards for Seamen Injured by Unseaworthy Conditions.

Nineteen years after *Miles*, this Court decided *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), which held that seamen could recover punitive damages for an employer's willful failure to pay "maintenance and cure" under general maritime law. Maintenance and cure refer to the no-fault system for seamen to receive curative medical care and a daily living allowance while recuperating from an injury or illness that arises while in service to a vessel. 557 U.S. at 407-08. Maintenance and cure claims arise from a seaman's employment, are contractual in nature, and are distinct from tort claims. *See Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527-28 (1938). Importantly, the decision in *Townsend* noted that the "reasoning of *Miles* remains sound." 557 U.S. at 420.

In explaining its decision in *Townsend*, the Court examined the history of the obligation to provide maintenance and cure to seamen, which "dates back centuries as an aspect of general maritime law" and was first recognized in American maritime law "in

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[4] This Court regularly cites to Schoenbaum's treatise on Admiralty and Maritime Law in its maritime decisions. *See, e.g., Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013); *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994). *Townsend* is compatible with the applicable holdings of *Miles* for reasons that are discussed in Sections I.B and I.C, *infra*.

two lower court decisions authored by Justice Story" in 1823 and 1832. 557 U.S. at 413. The Court reasoned that the general maritime claim at issue in *Townsend* (maintenance and cure) and the remedy sought (punitive damages) were both well-established before the passage of the Jones Act in 1920. *Id.* at 420. Neither part of that proposition, however, is true for unseaworthiness claims. Unlike in *Townsend,* Congress could not have been "envisioning the continued availability" of Respondent's unseaworthiness claim seeking punitive damages since neither the claim (strict liability unseaworthiness) nor the remedy (punitive damages) existed when the Jones Act was passed in 1920. *Id.* at 416.

1. The Type of Strict Liability Unseaworthiness Claim Brought by Respondent Did Not Exist When the Jones Act Was Passed in 1920.

The Court in *Townsend* cautioned that the three primary maritime claims for injury or death of a seaman—negligence, unseaworthiness, and maintenance and cure—are not necessarily interchangeable due to each one's own unique development:

> As this Court has repeatedly explained, "remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures."

557 U.S. at 423 (*quoting Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963)); *see also McAllister v.*

Magnolia Petroleum Co., 357 U.S. 221, 224–25 (1958); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927).

Like in *Miles*, this case concerns a claim for unseaworthiness. Different from the maintenance and cure claim at issue in *Townsend*, a seaman's ability to recover for personal injury through unseaworthiness is not centuries-old, but instead arose in "the late nineteenth century." *Mitchell v. Trawler Racer, Inc.* 362 U.S. 539, 544 (1960). At its inception, a seaman could not recover for unseaworthiness on the basis of strict liability, but could only recover if he was "injured in the service of a ship as a consequence of the owner's failure to exercise due diligence." *Id.* This Court first recognized such a recovery for unseaworthiness in *The Osceola*[5], when it held "[t]hat the vessel and her owner are . . . liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." 189 U.S. 158, 175 (1903).[6] Such was the state of a general maritime law claim for unseaworthiness at the time Congress promulgated the Jones Act.

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[5] *The Osceola* denied seamen a claim for negligence, which prompted Congress, 17 years later, to enact the Jones Act to provide seamen with a statutory tort recovery for injury or death due to their employer's negligence. *Townsend*, 557 U.S. at 415.

[6] As the majority in *Mitchell* recognized, the decisions of this Court following *The Osceola* suggest that the import of the enunciation of the unseaworthiness doctrine in *The Osceola* "was not to broaden the shipowner's liability, but, rather, to limit liability for negligence to those situations where his negligence resulted in the vessel's unseaworthiness." *Mitchell*, 362 U.S. at 546.

In contrast, the modern claim for unseaworthiness being pursued by Respondent is a strict liability claim that has its "humble origin as a dictum in an obscure case in 1922"—two years after passage of the Jones Act. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 496-97 (1971) (*citing Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922)). It was not until 1944, more than two decades after passage of the Jones Act, that the dictum in *Carlisle Packing Co.* became authoritative and this Court, in *Mahnich v. Southern S.S. Co.*, held "the exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances . . . ." 321 U.S. 96, 100 (1944). As the *Miles* Court recognized, this transformation of unseaworthiness in the 1940s into "a species of liability without fault"[7] constituted a "radical change" in the general maritime law. *Miles*, 498 U.S. at 25. When the Jones Act was passed in 1920, the concept of unseaworthiness bore almost no resemblance to the claim being asserted by Respondent here.

2. Punitive Damages Were Not Historically Available for Unseaworthiness Claims.

Just as Respondent's strict liability unseaworthiness claim did not exist when the Jones Act was enacted, the remedy Respondent seeks (punitive damages) did not exist as a remedy for violating the duty of seaworthiness in 1920 or before. To the contrary, this Court repeatedly has recognized compensatory damages as the remedy for a breach of the duty of seaworthiness. Neither the district court nor the

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[7] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 95 (1946).

Ninth Circuit below cited a single pre-Jones Act case awarding punitive damages for unseaworthiness. This telling omission demonstrates the lack of historical legal authority supporting Respondent's argument. This Court's precedents before and after the passage of the Jones Act demonstrate that compensatory damages were the remedy for unseaworthiness.

In 1903, the Court held that a seaman could not recover an "indemnity" for negligence, but could recover an "indemnity" for unseaworthiness. *The Osceola*, 189 U.S. at 175. The meaning of an "indemnity" in this context is significant because it demonstrates that the remedy for unseaworthiness contemplated by the Court before the Jones Act was compensatory damages. According to the first three editions of Black's Law Dictionary (1891, 1910, and 1933), the term "indemnity" was, at this time, "used to denote a compensation given to make the person whole from a loss already sustained". *Black's Law Dictionary* 614 (1st ed. 1891); *Black's Law Dictionary* 616 (2d ed. 1910); *Black's Law Dictionary* 949 (3d ed. 1933); *see also Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489, 493-94 (1875) (exemplary/punitive damages went beyond the limit of indemnity). Accordingly, the remedy, or "indemnity", referred to in *The Osceola* was one of compensatory damages.

In the decade immediately following passage of the Jones Act, this Court twice more made explicit that the remedy for unseaworthiness was an "indemnity" for compensatory damages. In *Pacific Steamship Co. v. Peterson*, the Court determined, first, that a seaman's right to maintenance, cure, and wages

was independent of a seaman's rights under the Jones Act; these two rights being "consistent and cumulative." 278 U.S. 130, 138 (1928) (emphasis added). Second, the Court in *Pacific Steamship* held that seamen could still elect to pursue an alternative right to recovery for unseaworthiness. *Id.* at 138-39. In reaching this second conclusion, the Court remarked that seamen were entitled only to compensatory damages under either the Jones Act or unseaworthiness:

> [W]hether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to but one indemnity by way of compensatory damages.

278 U.S. at 138 (citation omitted); *see also Carlisle Packing Co.*, 259 U.S. at 259 (if one of the crew was injured as the direct result of unseaworthiness, "he was entitled to recover compensatory damage") (citations omitted).[8]

"Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts,*

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[8] Even when the Court, in 1944, explicitly altered unseaworthiness to make it a strict liability claim, the remedy remained an "indemnity." *Mahnich*, 321 U.S. at 97-99.

Inc., 453 U.S. 247, 266–67 (1981).[9] Never once does the Court mention punitive damages in *Milwaukee & St. Paul Railway, Carlisle Packing Co, Pacific Steamship Co, Mahnich, Usner,* or any other decision as a remedy for unseaworthiness.[10] Instead, the Court consistently spoke, both before and after the enactment of the Jones Act, of the remedy for unseaworthiness as being an indemnity for compensatory damages.

In sum, *Townsend* is distinguishable because neither Respondent's unseaworthiness claim nor the remedy of punitive damages he seeks were well-established when the Jones Act was passed.[11] This is notably different from the ancient maintenance and cure claim at issue in *Townsend.* Precedent demonstrates that Respondent's unseaworthiness claim was first hinted at in dictum by this Court in a 1922 decision and did not realize its final transformation

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[9] The issue presented in this appeal is whether a claim may be stated to recover punitive damages for unseaworthiness under the general maritime law. If the Court answers that question in the affirmative, the next question is: what standard of proof will be required for such a recovery? In the event the Court addresses the second question, The Coalition submits that the standard of intentional or malicious misconduct from *City of Newport* should be the required quantum of proof. 453 U.S. at 266-67.

[10] The Ninth Circuit's decision below acknowledges that punitive damages are not compensatory damages. 880 F.3d at 1094; *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492-93 (2008) (punitive damages are aimed not at compensation).

[11] Even the Ninth Circuit, as recently as 1987, concluded that the availability of punitive damages for unseaworthiness was not well-established. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 n.1 (9th Cir. 1987) ("[w]hether or when punitive damages are available under the general maritime law is not entirely clear.").

into a strict liability claim until 1944 in *Mahnich. Usner*, 400 U.S. at 496-97. Moreover, the remedy for the "relatively little used" claim of unseaworthiness was—both before and after the Jones Act was passed—compensatory damages (*i.e.* an "indemnity"), not punitive damages. *Miles*, 498 U.S. at 25 (citations omitted).

C. Tort Claims Under the Jones Act and for Vessel Unseaworthiness Are "Siamese Twins" Under the Law and This Court Should Not Authorize a Remedy for One That Congress Has Refused for the Other.

Unlike maintenance and cure—which are contractual obligations arising out of a seaman's employment—unseaworthiness is a tort claim that, as explained in *Pacific Shipping*, provides the same compensatory remedy as a negligence claim under the Jones Act. Although the Ninth Circuit below acknowledged that it was *Miles*, and not *Townsend*, that involved an unseaworthiness claim, it nonetheless concluded there was no persuasive reason to distinguish maintenance and cure actions from unseaworthiness actions. The Coalition submits that the Ninth Circuit is incorrect.

None of the general maritime law cases cited by the Court in *Townsend* addressed the availability of punitive damages for unseaworthiness.[12] In his brief

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[12] The case cited in *Townsend* on the more general subject of punitive damages in maritime law was *The Amiable Nancy*, 16 U.S. 546 (1818). That case was a marine trespass case in which members of the crew of the Scourge, a privateer owned by the defendants, boarded and plundered the Amiable Nancy. 16 U.S. at 547-48. While the Court recognized that exemplary damages

in opposition to the petition for writ of certiorari in this case, Respondent alleged that "evidence points to the availability of punitive damages in pre-Jones Act unseaworthiness cases" and identified three cases as supporting this proposition. Brief for Respondent in Opposition at 16, *Dutra Group v. Batterton*, No. 18-266. But two of the cases relied on by Respondent are not unseaworthiness cases at all and the other neither awarded punitive damages nor pre-dated the Jones Act.[13]

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might be available against those who perpetrated this intentional act of piracy, it also held that exemplary damages were unavailable against the Scourge's owners who did not participate in or countenance the trespass. *Id.* at 558-59. The Court in *Townsend* also cited *The City of Carlisle*, 39 F. 807 (DC Ore. 1889) and *The Troop*, 118 F. 769 (D.C. Wash. 1902) as maintenance and cure cases where "the failure of a vessel owner to provide proper medical care for seamen has provided the impetus for damages awards that appear to contain at least some punitive element." 557 U.S. at 414.

[13] Respondent relies on *The Rolph*, 293 F. 269 (N.D. Cal. 1923), aff'd, 299 F. 52 (C.A.9 1924), *The Troop*, 118 F. 769 (D. Wash. 1902), aff'd, 128 F. 856 (9th Cir. 1904), and *The City of Carlisle*, 39 F. 807 (D. Ore. 1889). Brief for Respondent in Opposition at 16 n.6, *Dutra Group v. Batterton*, No. 18-266. Of these three, *The Rolph* is the only case where the court found that the vessel in question was unseaworthy. 293 F. at 272. That case does not, however, address (or even mention) punitive damages. Moreover, it post-dates the Jones Act and therefore should not serve as evidence of what Congress understood the maritime law to be in 1920. Nothing in the opinion suggests that the award in *The Rolph* was for anything but compensatory damages. Notably, the district court quoted *The Osceola*'s language regarding indemnity and the Ninth Circuit, in affirming, phrased the question presented as "whether the vessel can be held liable to an indemnity for injuries . . . ." *The Rolph*, 293 F. at 272; *The Rolph*, 299 F. 52, 54 (C.A.9 1924). As noted above, *Townsend* recognized *The City*

In addition to the significant historical differences between claims for unseaworthiness and for maintenance and cure, *Townsend* expressly states that "[t]he reasoning of *Miles* remains sound." 557 U.S. at 420. Accordingly, any suggestion that *Miles* has been weakened or abrogated by *Townsend* should be rejected. Unlike *Townsend*, *Miles'* holding directly barred non-pecuniary remedies for unseaworthiness claims under general maritime law. Therefore, *Miles* cannot be fairly squared with the Ninth Circuit's decision below. If this Court extends *Townsend*'s holding to allow punitive damages in unseaworthiness claims, the holding and rationale of *Miles* will be undermined or abrogated altogether. To maintain the holdings of both *Miles* and *Townsend*, this Court should conclude that Respondent's unseaworthiness claim seeking punitive damages is barred under *Miles* and is distinguishable from *Townsend* on at least two grounds. First, *Townsend* involved a non-tort claim for maintenance and cure. Second, *Townsend* involved a claim and remedy that were well-established in the law prior to the Jones Act, which cannot be said of Respondent's unseaworthiness claim seeking punitive damages.

Claims for negligence and unseaworthiness, while legally distinct, are nonetheless too closely related in the law to have different remedies:

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of Carlisle and *The Troop* as instances where punitive damages appeared to have been awarded for the violation of the duty to provide maintenance and cure. Neither *The Troop* nor *The City of Carlisle* mention unseaworthiness and both were, as recognized in *Townsend*, instances where the courts applied the law of maintenance and cure.

> When a seaman is injured, he has three means of recovery against his employer: (1) maintenance and cure, (2) negligence under the Jones Act, and (3) unseaworthiness. Without elaborating on the nature of these three actions, it is sufficient to say that they are so varied in their elements of proof, type of defenses, and extent of recovery that a seaman will rarely forego his right to sue for all three. But if the seaman is to sue for both unseaworthiness and Jones Act negligence, he must do so in a single proceeding. That is a consequence of this Court's decision in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069, which held that these claims were but alternative 'grounds' of recovery for a single cause of action.

McAllister, 357 U.S. at 224-25; *see also Pacific Steamship*, 278 U.S. at 138. Legal scholars have also explained that the two claims (negligence and unseaworthiness) are "Siamese Twins" under the law. A leading treatise on admiralty and maritime law, describes the relationship between the two claims, as follows:

> The Jones Act count and the unseaworthiness count overlap completely: they derive from the same accident and look toward the same recovery. As a matter of jurisprudential elegance or even of common sense it would have been desirable (and would still be desirable) to abandon the cumbersome fiction that two causes of action are involved and to restate the seaman's cause of action for death

> or injury as being what it is. That has not been done and, in all probability, will never be done. After ten or fifteen years of confusion, the admiralty lawyers and the admiralty judges came to understand that the Jones Act count and the unseaworthiness count are Siamese Twins.

G. Gilmore & C. Black, *Law of Admiralty* § 6-38, p. 383 (2d ed. 1975)[14]; *see also Magee v. United States Lines, Inc.*, 976 F.2d 821, 823 (2d Cir. 1992); *Karvelis v. Constellation Lines S.A.*, 806 F.2d 49, 51–52 (2d Cir. 1986). This "Siamese Twins" analogy aptly describes Respondent's injury claims, which involve allegations of both an unseaworthy condition and his employer's negligence arising from the same operative facts. His claims for unseaworthiness and negligence truly are but "a single cause of action" that should not have different legal remedies.

For more than 100 years, this Court has repeatedly stressed that uniformity is an overriding goal in establishing maritime law. *Miles*, 498 U.S. at 33; 1 Schoenbaum, *Admiralty & Maritime Law* § 5:10 (6th ed. 2018) ("The reasoning of *Miles* rests on two ideas, that the courts should not create damage awards that go beyond those mandated by applicable statutes; and that uniformity is an overriding goal in maritime law"). This arises from the constitutionally-based principle that federal maritime law should be a system

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[14] This Court regularly cites to Gilmore and Black's treatise for principles of admiralty and maritime law. *See, e.g. Townsend*, 557 U.S. 404; *Miles*, 498 U.S. 19.

of law coextensive with, and operating uniformly in, the whole country.

Permitting the recovery of punitive damages for an unseaworthiness claim while Congress has barred such a recovery for its "Siamese Twin" claim of negligence would undermine the uniformity that the law strives to achieve in maritime matters.

II. THIS COURT SAILS IN WATERS ALREADY CHARTED BY CONGRESS, WHICH CREATED A UNIFORM SYSTEM OF MARITIME TORT RECOVERY FOR SEAMEN THAT EXCLUDES PUNITIVE DAMAGES.

Tort recovery for injured seamen and vessel seaworthiness are both areas of law exhaustively regulated by Congress. This is another important distinction from the contractual maintenance and cure claim at issue in *Townsend*. In only two limited instances during the past 200 years has Congress enacted laws about maintenance and cure. *Townsend*, 557 U.S. at 415-17 (Congress has only addressed maintenance and cure issues in the context of: (1) foreign workers on offshore oil and mineral production facilities and (2) sailing school students and instructors). The same, however, cannot be said for either tort recovery for maritime workers or vessel seaworthiness issues. As discussed below, Congress has legislated expansively about both subjects.

A. Congress Has Created a Uniform System of Tort Recovery for Injured Maritime Workers That Excludes Punitive Damages.

While Congress has largely refrained from legislating regarding seamen's ancient contractual rights

to maintenance and cure, it has legislated broadly concerning tort recovery for injuries and death of maritime workers. Congress has enacted an "ordered system of recovery for seaman's injury and death." *Miles,* 498 U.S. at 36.

In 1920, Congress enacted the Jones Act to provide seamen with a negligence claim against their employers for injury or death. Remedies available under the Jones Act are limited to pecuniary losses. *Miles, supra.* That same year, Congress enacted the Death on the High Seas Act (DOHSA). 46 U.S.C. §§ 30301-30308. DOHSA created a claim for any person (including seamen) killed on the high seas, which are defined as beyond three nautical miles from shore. *Id.* When applicable, DOHSA is the exclusive remedy; liability may be based on negligence, unseaworthiness (for seamen), intentional conduct, or products liability law.[15] The measure of recovery under DOHSA is statutorily limited to pecuniary loss. 46 U.S.C. § 30303; *Dooley v. Korean Air Lines Co.,* 524 U.S. 116, 122 (1998); *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 201 (1st Cir. 1994) (DOHSA only permits recovery of damages for pecuniary loss); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 n.3 (6th Cir. 1993).

In 1927, Congress passed the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901-

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[15] Upholding the Ninth Circuit's decision would also create the troubling anomaly that seamen who are fatally injured due to a willful breach of the duty of seaworthiness on the high seas (within DOHSA's coverage) would be barred from recovering punitive damages, while seamen who are killed closer to shore (outside DOHSA's coverage) would be permitted such recovery. *See* Section III.B, *infra.*

950. The Longshore Act generally provides maritime workers who do not qualify as seamen with both injury and death benefits payable by their employers. Similar to state workers' compensation laws, the Longshore Act does not permit maritime workers to recover against their employers for punitive damages. *Miller*, 989 F.2d at 1457.

In summary, all three of the major Congressional enactments in the area of maritime tort recovery for injury and death demonstrate that Congress has made a policy determination against allowing maritime workers to recover punitive damages. *Miller*, 989 F.2d 1450. This Court should not permit the uniform policy judgments reflected in these Congressional enactments to be circumvented by allowing seamen to recover punitive damages for a judicially-created general maritime law unseaworthiness claim, especially when such a claim did not exist in its present form when Congress enacted the laws. *Miles*, 498 U.S. at 27 (admiralty courts should look primarily to Congress's legislative enactments for policy guidance).

B. Congress Has Occupied the Field of Vessel Seaworthiness by Enacting a Comprehensive Federal Scheme to Regulate Vessel Safety, and to Deter and Punish Those Who Operate Unseaworthy Vessels.

In addition to the pecuniary limit it placed on tort remedies for injured maritime workers, Congress has also legislated exhaustively in the area of vessel seaworthiness and safety standards. *Townsend*, 557 U.S. at 420 ("Congress and the States have legislated extensively in these areas."); *see also Miles*, 498 U.S. at 27. As shown below, Congress has enacted a system

of laws to address vessel seaworthiness, which includes civil and criminal penalties to deter and punish those who operate unseaworthy vessels. Because Congress has so comprehensively regulated vessel seaworthiness issues, this Court should not create a new means of punishment and deterrence in the form of punitive damages.

Congressional regulation of the shipping industry is far-reaching and includes a comprehensive safety and inspection protocol for vessels. 46 U.S.C. §§ 3301-3318; *see also* United States Coast Guard, *Flag State Control in the United States: 2017 Domestic Annual Report*, https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/CG-CVC/CVC1/AnnualRpt/2017DomesticAnnualReport.pdf (documenting 18,424 Coast Guard inspections on 12,189 U.S. flag vessels).

The scope of federal regulations governing vessel seaworthiness issues continues to grow. By way of example, in 2004, Congress passed the Coast Guard and Maritime Transportation Act. 108 P.L. 293, 118 Stat. 1028. This statute sought to enhance vessel seaworthiness of towing vessels, including those operated by members of The Coalition, through a stringent (and mandatory) system of vessel inspections and uniform safety standards. This Act began a more-than-decade-long process of rulemaking that resulted in 46 C.F.R. Chapter I, Subchapter M, Parts 136-144, which mainly took effect in 2018 (collectively "Subchapter M"). Subchapter M is a landmark development for the towboat and barge industry because towing vessels must undergo extensive safety inspections to ensure compliance with uniform standards established by the Coast Guard.

A central feature of the federal vessel inspection programs (including Subchapter M) is that vessels must have Certificates of Inspection (COI) to operate. 46 U.S.C. §§ 3301-3318. Although the requirements vary based on the precise type of vessel involved, a COI may only be obtained through compliance with a Coast Guard approved safety and inspection program. Absent a vessel owner's compliance with these federally-enacted programs for the monitoring of vessel seaworthiness, a COI will not be issued and serious penalties may result. 46 U.S.C. § 3318. The Coast Guard is also equipped with the power to enforce regulatory violations through penalties and may suspend or revoke necessary maritime licenses.

As a result of Congress's expanding regulatory schemes, distinctions between the "Siamese Twins" of unseaworthiness and Jones Act negligence are increasingly difficult to decipher. Under the negligence *per se* doctrine applied in maritime law, violation of a maritime safety statute or regulation establishes negligence. *See Kernan v. American Dredging Co.*, 355 U.S. 426 (1958); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).[16] This legal principle is applicable "without regard to whether the injury flowing from the breach was the injury the statute sought to prevent." *Kernan*, 355 U.S. at 433. Moreover, comparative fault may provide no defense to negligence *per se*. *Fuszek v. Royal King Fisheries*, 98 F.3d 514, 517 (9th Cir. 1996). Accordingly, the "Siamese Twins" are too

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[16] *See also* Marc C. Hebert & Lindsey M. Ajubita, *Managing Liability and Insuring Risk in the World of Subchapter M: Legal Issues to Consider and the Obligations of Marine Operators*, 16 LOY. MAR. L.J. 289, 312 (Summer 2017).

interconnected in today's expansive regulatory scheme to permit different remedies.

The availability of punitive damages for unseaworthiness would fundamentally alter the balance of the system Congress created. Judge-made general maritime law should not supplement these laws to permit punitive damages when Congress has already acted to standardize vessel safety rules and enforcement mechanisms to govern nearly every type of commercial vessel. This Court should not second-guess Congress's policy choices.

Congress has also imposed criminal liability for knowingly sending or attempting to send an unseaworthy vessel to sea that is likely to endanger a life. 46 U.S.C. § 10908; *see also* 46 U.S.C. § 3318 (criminal and civil penalties for violations of vessel inspection statutes). Section 10908 authorizes punishment of up to five years imprisonment, a fine of up to $1,000, or both. Other portions of the same chapter address procedures for seamen to report unseaworthy vessels. *See, e.g., United States v. Rivera*, 131 F.3d 222 (1st Cir. 1997).

Despite the extensive federal statutory and regulatory laws regarding vessel seaworthiness, Congress has never sought to deter unseaworthiness through punitive damages. Therefore, this Court too should decline Respondent's invitation that it do so.

C. Extension of Remedies Beyond Congress's Uniform Plans for Maritime Tort Law and Seaworthiness Is Unnecessary to Deter Unseaworthiness and Will Impair the Ability of Maritime Parties to Settle Claims Efficiently.

Apart from civil and criminal liabilities, there is a more fundamental reason that punitive damages are unnecessary to deter unseaworthiness. Namely, vessel owners and operators have inherent financial incentives to avoid vessel unseaworthiness. Unseaworthy vessels are not profitable because they are more likely to sink, cause pollution, damage cargo, and injure crewmembers and others. In light of these already existing risks and liabilities, it is most unlikely that a vessel operator would gain financially by intentionally operating unsafe vessels.[17]

One practical impact of authorizing punitive damages is that it would inhibit a central goal of maritime law: the promotion of settlement and judicial economy. *McDermott*, 511 U.S. at 211. If authorized by this Court, claims seeking punitive damages for unseaworthiness will become boilerplate in seamen's complaints. The availability of punitive damages will prolong and complicate the resolution of maritime injury claims. The scope and expense of maritime litigation will increase. The very threat of punitive damages will bring unjustified value to these claims because the cost and risk of defending against such claims will be too steep. The danger of an astronom-

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[17] There are fewer inherent incentives for shipowners to fulfill maintenance and cure obligations, which were at issue in *Townsend*.

ical verdict for punitive damages[18], will discourage prudent maritime employers from defending meritless claims because they will instead be forced to avoid the risk of highly unpredictable and potentially devastating punitive damage awards. Moreover, as set forth in Section III, *infra*, whether such damages are insurable is governed by varying state laws, which further harms maritime commerce and uniformity.

III. ALLOWING SEAMEN TO RECOVER PUNITIVE DAMAGES FOR UNSEAWORTHINESS WOULD CREATE SEVERAL ANOMALIES HARMFUL TO THE CONSTITUTIONALLY-MANDATED UNIFORMITY OF MARITIME LAW.

This Court has repeatedly held that the "fundamental interest giving rise to maritime jurisdiction is the protection of maritime *commerce*." *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 25 (2004) (internal quotation marks omitted) (emphasis in original); *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991); *Sisson v. Ruby*, 497 U.S. 358, 367 (1990). One way in which the federal courts have protected and fostered maritime commerce is by maintaining a uniform and consistent maritime law. The importance of uniformity is well documented in this Court's jurisprudence, with the Court's pronouncement in *The Lottawanna* being a particularly famous enunciation of this doctrine:

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[18] *See, e.g., Clausen v. Icicle Seafoods, Inc.*, 272 P.3d 827 (Wash. 2012) (affirming award of $1,300,000 in punitive damages under *Townsend* when actual damages due seaman on maintenance and cure claim was $37,420).

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. 558, 575 (1874).

Allowing an injured seaman to recover punitive damages under the general maritime law for unseaworthiness would create undesirable anomalies in federal maritime law. These anomalies would disrupt uniformity and deprive maritime operators of the consistency and predictability necessary to foster thriving maritime commerce.

A. The Insurability of Punitive Damages Varies by State.

There is no general maritime law rule governing whether punitive damages may be lawfully covered by insurance. *Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666, 669 (5th Cir. 1992). Because there is no specific and controlling federal maritime law rule, state law would apply to determine whether punitive damages are insurable. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). However, the insurability of punitive damages varies by state. Accord-

ingly, a ruling in favor of Respondent would create an unlevel interstate playing field where some vessel owners will be able to insure against the possibility of a punitive damage award for unseaworthiness but others will not.[19]

The patchwork of contradictory state laws is apparent in an examination of just those nine states in which members of The Coalition regularly operate. Punitive damages are insurable in Arkansas[20], Mississippi[21], Tennessee[22], and Wisconsin[23]. Under Illinois[24] and Indiana[25] law, punitive damages are insurable when vicariously assessed but are not insurable when directly assessed. Under Kentucky law, punitive damages are insurable so long as "the punitive damages are imposed for a grossly negligent act of the insured rather than an intentional wrong of the insured." *Continental Ins. Cos. v. Hancock*, 507 S.W.2d

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[19] The effect of permitting seamen to recover punitive damages for unseaworthiness will impact international maritime commerce as well as interstate maritime commerce. *Baker*, 554 U.S. at 496 ("Punitive damages overall are higher and more frequent in the United States than they are anywhere else").

[20] *Southern Farm Bureau Casualty Insurance Co. v. Daniel*, 440 S.W.2d 582, 584 (Ark. 1969).

[21] *Anthony v. Frith*, 394 So.2d 867 (Miss. 1981).

[22] *General Casualty Co. of America v. Woodby*, 238 F.2d 452 (6th Cir. 1956).

[23] *Brown v. Maxey*, 369 N.W.2d 677 (Wis. 1985).

[24] *Beaver v. Country Mutual Insurance Co.*, 420 N.E.2d 1058, 1061 (Ill. 1981).

[25] *Norfolk & Western Railway Co. v. Hartford Accident & Indemnity Co.*, 420 F. Supp. 92, 95 (N.D. Ind. 1976).

146, 151-52 (Ky. 1973). Punitive damages are not insurable under Minnesota law when directly assessed, and it is unclear if they are insurable when vicariously assessed. *United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487 (8th Cir. 1990). Whether public policy prohibits the insurability of punitive damages is an open question in Missouri. *See DeShong v. Mid-States Adjustment, Inc.*, 876 S.W.2d 5 (Mo. Ct. App. 1994) (finding the insurance policy did not cover punitive damages without deciding whether public policy would prohibit enforcement).

As the above survey of just nine states demonstrates, if this Court were to hold for Respondent, vessels could be operated on the same inland waterway (the Mississippi River, for example), performing the same work, but an operator whose insurance is governed by Wisconsin law could insure against punitive damages for unseaworthiness while an owner just across the river, whose insurance is governed by Minnesota state law, could not. The principle of maritime uniformity calls for this Court to avoid such inconsistencies and unfairness.

B. Holding for Respondent Will Create Unjustifiable Anomalies in General Maritime Law.

In *Miles*, this Court held that Congress must have intended to incorporate FELA's "pecuniary limitation on damages" into the Jones Act. 498 US at 32. The *Miles* Court, therefore, did not allow recovery for loss of society (a category of nonpecuniary damages) for unseaworthiness, holding, "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is with-

out fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33. The Court described this holding as "restor[ing] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Id.* at 33. Absent reversal, this Court will recognize that a class of workers (seamen) may recover a remedy (punitive damages) against their employers that every other class of workers, including railroad workers, is denied. Doing so will defeat the uniform rule that the Court restored in *Miles*.

If this Court holds for Respondent by overruling *Miles*, it will create a troubling anomaly in maritime law. If a seaman is killed as a result of a breach of the duty of seaworthiness while more than three nautical miles from shore, DOHSA's exclusive application will limit tort recovery to pecuniary losses. However, if that same seaman is less than three nautical miles from shore, the general maritime law will permit his representative to seek punitive damages. Such vastly different remedies based merely on the distance the vessel is from shore would violate this Court's long-held objective of pursuing uniformity in maritime matters with a healthy regard for Congress's policy judgments. *Miles,* 498 U.S. at 27, 32-33; *Mobil Oil Corp.*, 436 U.S. 618.

On the other hand, if this Court holds for Respondent without overruling its unanimous decision in *Miles*, a different anomaly is nonetheless created. Whether an injury is fatal should not be the key distinction regarding whether punitive damages are available to a seaman for a willful and wanton breach

of the duty of seaworthiness. Yet, that is the alternative to holding for Respondent without overruling *Miles*. Such an anomalous and illogical result should be avoided because it creates the perverse incentive that fatal injuries are worth less than non-fatal injuries due to the availability of punitive damages. If punitive damages "are aimed not at compensation but principally at retribution and deterring harmful conduct," such a result is unwarranted. *Baker*, 554 U.S. at 492.

CONCLUSION

Amicus Curiae respectfully requests that the Court reverse the Ninth Circuit's decision below and hold that punitive damages are not an available remedy for unseaworthiness.

Respectfully submitted,

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JANUARY 28, 2019

No. 18-266

In The
Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Production of oil in United States waters began in 1894 from piers in the Santa Barbara Channel with the first offshore platform constructed in 1932 off the coast of California. After World War II, offshore drilling and production grew exponentially with tens of thousands of wells drilled in the waters of over seventy countries.[2]

Founded in 1940, the International Association of Drilling Contractors (IADC) is a non-profit member association dedicated to improving safety and advancing drilling technology in the upstream petroleum industry. At the core of IADC's mission is an imperative to promote the highest standards of stewardship in industry safety standards, environmental integrity, and operational efficiency. As part of that mission, the IADC strives for reasonable regulation and legislation governing the work of its members.

The oil and gas industry provides the fuel that powers the world economy. Despite its name, the IADC includes more than just drilling contractors (companies who own and operate land or offshore drillings

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. *Amicus curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office.

[2] David W. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 973 (1977).

rigs). Its members also include operators and producers (companies engaged in exploring for and producing oil and natural gas) and other companies associated with the production of oil and gas (including service companies, equipment manufactures, and consultants). The IADC is committed to promoting responsible operations by fostering industry best practices that mitigate negative impact and maximize the benefits of drilling to the betterment of its workers, the economy, and the country.

The U.S. is currently the world's top producer of oil and natural gas.[3] This domestic oil and gas production enables our energy independence by lessening our reliance on foreign oil and gas, particularly during periods of increased tensions in international trade. The United States spends $81 billion a year to protect global oil supplies and provide continuous fuel to American gas stations.[4] In 2001, President George W. Bush, while discussing the importance of diversifying the country's energy supplies for national security, stated that an overdependence on any source of energy from a foreign source, "leaves [the United States] vulnerable to price shocks, supply interruptions, and in

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[3] U.S. Energy Information Administration, Today In Energy, *United States Remains the World's Top Producer of Petroleum and Natural Gas Hydrocarbons*, May 21, 2018, https://www.eia.gov/todayinenergy/detail.php?id=36292.

[4] Tom DiChristoper, *US Spends $81 Billion a Year to Protect Global Oil Supplies, Report Estimates*, CNBC, Sept. 21, 2018, https://www.cnbc.com/2018/09/21/us-spends-81-billion-a-year-to-protect-oil-supplies-report-estimates.html.

the worst case, blackmail."[5] More than a decade later, in 2012, President Barack Obama stated that the Department of Defense was the world's largest consumer of energy[6] for fueling military vehicles, ships, and planes.[7] The Department of Defense itself recognizes:

> Energy is a fundamental enabler of military capability, and the ability of the United States to project and sustain the power necessary for defense depends on the assured delivery of this energy. It must be available at home and abroad, over great distances, through adverse weather, and across air, land, and sea, often against determined adversaries.[8]

In 2017, Reuters reported that while the use of oil for the U.S. military declined by 20% from 2007 to 2015, the decline was due to the decrease in combat operations rather than a rising efficiency and use of renewable energy.[9] Although the effort of policymakers

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[5] George W. Bush, President, Remarks by the President to Capital City Partnership (May 17, 2001), *available at* https://georgewbush-whitehouse.archives.gov/news/releases/2001/05/20010517-2.html.

[6] Barack Obama, President, Remarks by the President in the State of the Union Address (Jan. 24, 2012), *available at* https://obamawhitehouse.archives.gov/the-press-office/2012/01/24/remarks-president-state-union-address.

[7] William Joyce, *Oil Dependency: a Subtle but Serious Threat*, American Security Project (June 4, 2013), https://www.americansecurityproject.org/oil-dependency-a-subtle-but-serious-threat/.

[8] Department of Defense, *2016 Operational Energy Strategy*, https://www.acq.osd.mil/eie/OE/OE_library.html.

[9] Timothy Gardner, *U.S. Military Marches Forward On Green Energy, Despite Trump*, Reuters (Mar. 1, 2017), https://www.reuters.

to move towards green energy is commendable, fuels produced by the oil and gas industry continue to power the national defense interests of the United States.

This record production of oil and gas also improves our economy in a number of ways. Production at home allows for export and sale of U.S. hydrocarbons abroad. It provides millions of jobs for American workers.[10] In addition, federal and state governments receive substantial revenue from the leasing of offshore lands for oil and gas development.

Offshore production in federal waters of the Gulf of Mexico alone accounts for 18% of total U.S. crude oil production.[11] In 2017, over 600 million barrels of oil and over one billion mcf of natural gas were produced in the Gulf of Mexico.[12] The producing companies paid the federal government more than $3.7 billion in royalties, rents, bonuses, and other fees in order to produce this oil and gas.[13] In turn, the federal government

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com/article/us-usa-military-green-energy-insight/u-s-military-marches-forward-on-green-energy-despite-trump-idUSKBN1683BL.

[10] PWC, *Impacts of the Oil and Natural Gas Industry on the US Economy in 2015*, July 2017, at E1, https://www.api.org/news-policy-and-issues/american-jobs/economic-impacts-of-oil-and-natural-gas (last visited Jan. 24, 2019) (finding that in 2015, over ten million U.S. jobs were supported by natural gas and oil).

[11] U.S. Energy Information Administration, Gulf of Mexico Fact Sheet, July 17, 2018, https://www.eia.gov/special/gulf_of_mexico/data.php.

[12] U.S. Department of the Interior, National Resources Revenue Data, Gulf of Mexico, https://revenuedata.doi.gov/explore/offshore-gulf/ (last visited Jan. 21, 2019).

[13] *Id.*

paid a portion of these revenues to states adjacent to the Gulf of Mexico.[14]

The importance of the offshore oil and gas industry in the U.S. was further highlighted in 2014 when oil prices collapsed. The downturn resulted in a loss of more than 160,000 jobs and bankrupted a number of offshore drilling companies.[15] Further, the active rig count (another market indicator) plummeted as drillers took their rigs out of service.[16]

Members of the IADC employ offshore oil and gas workers who make up a specialized subset of Jones Act seamen. Although some offshore workers in the energy sector work on installations permanently affixed to the ocean floor, many work on specialized floating structures considered vessels under the general maritime law. These specialized vessels may include drill ships, semi-submersibles, jackup rigs, and drilling barges (collectively referred to as mobile offshore drilling

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[14] 43 U.S.C. § 1337(g)(2).

[15] Clifford Krauss, *Falling Oil Prices May Make Trump Happy but They Pose Risks for U.S.*, N.Y. Times, Nov. 29, 2018, at B1, *available at* https://www.nytimes.com/2018/11/29/business/prices-trump.html. Law firm Haynes and Boone, LLP keeps a comprehensive list of North American oil and gas producers who have filed for bankruptcy since the beginning of 2015. Haynes & Boone, LLP Oil Patch Bankruptcy Monitor, Jan. 7, 2019, http://www.haynesboone.com/Publications/energy-bankruptcy-monitors-and-surveys. The list has reached 167. *Id.* at pp. 7–11.

[16] Baker Hughes' North America Rig Count, Jan. 18, 2019, http://phx.corporate-ir.net/phoenix.zhtml?c=79687&p=irol-reportsother (Excel spreadsheet entitled "North America Rotary Rig Count (Jan 2000—Current)," tab entitled "Gulf of Mexico Split").

units or MODUs). These vessels are generally contracted by operators for multi-million to multi-billion dollar offshore oil and gas projects. IADC members are involved in the ownership, operation, maintenance, and regulatory compliance attendant to these MODUs.

Workers on these offshore drilling rigs are highly trained, well-compensated specialists who regularly deal with operational and environmental hazards that traditional seamen never encounter. Before a MODU begins drilling, the vessel must "rig up" with extraordinarily large and heavy equipment such as a lower marine riser package that allows deepwater drilling operations to proceed safely in compliance with regulatory and industry standards. Workers on the drill floor must keep downhole pressures under control through the use of complex equipment such as blowout preventers, hydraulic actuators, and chemically weighted drilling fluids introduced into the wellbore by high pressure pumps. Drilling operations involve heavy drill pipe and casing that is lifted above the drill floor and then lowered to drill wells up to 35,000 feet into the earth.[17] In addition to valuable hydrocarbons, deepwater oil and gas wells may also contain toxic gases such as hydrogen sulfide and carbon dioxide. Further, these drilling, completion, and workover operations occur around the clock in all manner of weather

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[17] Blade Energy Partners, *Applied Advancements in Technologies that Continue Increasing Wells' Safety, Environmental Protection & Operations Across the Upstream Life Cycle* 15 (Aug. 29, 2018), https://www.blade-energy.com/applied-advancements-in-technologies/.

conditions and sea states.[18] Even NASA has studied deepwater drilling for insight relative to safe operations in a hostile work environment.[19]

While a traditional seaman may face normal risks arising from the operation of a traditional ship at sea (operating the vessel equipment in a dynamic environment under adverse weather and sea conditions), offshore oil and gas workers working aboard MODUs face those and many more non-traditional risks. As one commentator put it: "The perils peculiar to the drilling industry are compounded by all the dangers of the sea."[20] These vessel-based oil and gas workers may face the traditional perils of the sea, but they also contend with hazards associated with drilling thousands of feet into the earth from a MODU located thousands of feet above the sea floor. They are extensively trained and must comply with safety and environmental regulations specific to the offshore oil and gas industry, in addition to the traditional regulatory regimen encountered when conducting vessel operations at sea.

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[18] *See generally* William L. Leffler et al., *Deepwater Petroleum Exploration & Production: A Nontechnical Guide* (PennWell 2003).

[19] APPEL News Staff, *Academy Case Study: The Deepwater Horizon Accident Lessons for NASA*, 4.3 Academy Case Study (May 10, 2011), *available at* https://appel.nasa.gov/2011/05/11/aa_4-4_acs_deepwater_horizon_lessons-html/.

[20] David W. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 973 (1977).

The IADC is deeply concerned about the effect the decision below could have on the upstream petroleum industry and its special subset of seamen.

SUMMARY OF THE ARGUMENT

Rigorous and protective compensation schemes for seamen already exist. Congress occupies those waters and has determined that punitive damages are not part of that arrangement. Nevertheless, as a practical matter, this rigorous compensation scheme does have a deterrent effect in its present form that compels safe operations—without punitive damages. Congress has *not* ignored the need for deterrence and punishment of unsafe actors in the offshore oilfield. It has set a course that occupies those waters by virtue of its creation of numerous federal agencies, statutes, and rules regulating the operations of IADC members. Even if the Court were to determine that the addition of punitive damages to the existing seaman's compensatory scheme would provide additional deterrence or benefit to seamen, it could take no such path. The course it would seek to sail would lead it to waters already occupied by Congress in the areas of both compensation and deterrence. Allowing punitive damages as contemplated by the Ninth Circuit would affect IADC members by having a detrimental impact on uniformity in worker claims, settlement and trial of such claims, contractual obligations and insurance coverage in the

offshore oilfield, as well as negatively impacting the economy and consumers in general.

ARGUMENT

I. IADC MEMBERS ARE ALREADY DETERRED FROM RECKLESSLY DISREGARDING SAFETY

A. Effective Deterrence by Multiple Regulators

The purpose of punitive damages is not to compensate one for loss, but to punish and deter bad conduct. *See, e.g.*, *Restatement (Second) of Torts* § 908 (1979) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."); *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893) ("Exemplary or punitive damages [are] awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others. . . ."). Conversely, the purpose of unseaworthiness and Jones Act remedies afforded seamen is not to punish or deter shipowners, but to compensate seamen for injury or death. Congress' purpose in enacting FELA and incorporating it into the Jones Act was to provide monetary compensation to seamen who suffer injury or death. *See, e.g.*, *St. Louis, I.M. & S.R. Co. v. Craft*, 237 U.S. 648, 657–58 (1915) (recovery under FELA is "confined to . . . loss and

suffering").[21] Indeed, whether a seaman sues for Jones Act negligence or unseaworthiness, "he is entitled to but one indemnity by way of compensatory damages." *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138 (1928).

Rather than promoting deterrence through its compensation scheme, Congress has acted via its regulatory agencies. It created the U.S. Coast Guard (USCG) and charged it with, among other things, promulgating and enforcing regulations "for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." 14 U.S.C. § 2 (setting out the primary duties of the USCG). This includes the training and licensing of merchant seamen, inspection and certification of vessels, and promulgation and enforcement of the regulations necessary to carry out the mandate assigned to it by Congress. *See generally* 46 U.S.C. §§ 2101 to 14702 ("Vessels and Seamen").

Congress likewise created the U.S. Maritime Administration (MARAD) whose duties include regulation of ships, shipping, ship building, vessel operations, safety, and national security.[22] MARAD's mission is to

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[21] *See also Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 65, 69–71 (1913) (FELA provides right to "recover[ ] such damages as would . . . compensate[ ]" for loss); *Gulf, Colo., & Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 175 (1913) (recovery under FELA "must . . . be limited to compensating those . . . as are shown to have sustained some pecuniary loss"); *American R.R. Co. of Porto Rico v. Didricksen*, 227 U.S. 145, 149 (1913) ("The damage [under FELA] is limited strictly to the financial loss thus sustained.").

[22] MARAD, About Us, Nov. 13, 2018, https://www.maritime.dot.gov/about-us.

"foster, promote, and develop the merchant marine industry of the United States." 49 U.S.C. § 109(a) (setting out the organization and mission of MARAD). It is specifically charged with training vessel officers and maintaining a strong and modern merchant marine. 49 C.F.R. § 1.92 (setting out the responsibilities of MARAD).

Similarly, Congress has created agencies charged with regulating the oil and gas industry with a similar mandate to punish and deter unsafe conduct. In addition to the USCG and MARAD, offshore oil and gas producers are also subject to the rules and regulations of the Bureau of Safety and Environmental Enforcement (BSEE).[23] Indeed, drilling contractors labor under significantly greater regulatory requirements than traditional vessel owners.

Following the 2010 *Deepwater Horizon* Disaster in the Gulf of Mexico, the President assembled the National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling, which released a comprehensive report in January 2011. The Commission concluded:

> Deepwater energy exploration and production, particularly at the frontiers of experience, involve risks for which neither industry

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[23] In 1953, Congress enacted the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356a, and authorized the Secretary of the Interior to, among other things, regulate oil and gas production on the Outer Continental Shelf (OCS). The Secretary of the Interior delegated this regulation to BSEE. 30 C.F.R. § 250.101.

> nor government has been adequately prepared, but for which they can and must be prepared in the future.
>
> . . .
>
> Fundamental reform will be needed in both the structure of those in charge of regulatory oversight and their internal decisionmaking process to ensure their political autonomy, technical expertise, and their full consideration of environmental protection concerns.
>
> Because regulatory oversight alone will not be sufficient to ensure adequate safety, the oil and gas industry will need to take its own, unilateral steps to increase dramatically safety throughout the industry, including self-policing mechanisms that supplement governmental enforcement.[24]

After initial regulatory changes following the *Deepwater Horizon* incident, the federal government ultimately established BSEE. BSEE has created a series of comprehensive regulatory programs focused on operational safety and environmental protection relative to offshore oil and gas activities.

For example, BSEE requires that all operators have a Safety and Environmental Management Systems (SEMS) program subject to third-party audits. 30 C.F.R. §§ 250.1900 to 250.1933. This promotes safety

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[24] Nat'l Comm'n on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling* vii (Jan. 2011), https://www.govinfo.gov/app/details/GPO-OILCOMMISSION/summary.

by ensuring that all personnel aboard an offshore vessel are complying with the policies and procedures identified in the operator's SEMS program. *Id.* at § 250.1901. Under the SEMS rule, operators must implement a training program so that all of their employees and contractors are trained to work safely. *Id.* at § 250.1915. SEMS requires operators to evaluate their drilling contractor's safety and environmental performance and ensure that the contractors have their own safe work practices. *Id.* at § 250.1914. Further, operators and contractors must create a written agreement on appropriate contractor safety and environmental practices prior to the start of work on the operator's project. *Id.* at § 250.1914.

The SEMS program empowers all personnel aboard the vessel who witness an imminent risk or dangerous activity to stop work. *Id.* at § 250.1930. The SEMS rule also requires an "employee participation plan" that promotes a participatory environment where all offshore industry employees may eliminate or mitigate safety hazards. *Id.* at § 250.1932. It also established guidelines for reporting unsafe conditions and violations of regulatory requirements. *Id.* at § 250.1933. Since the *Deepwater Horizon* tragedy, BSEE's requirements for SEMS programs have evolved as it has identified additional ways to manage operational safety hazards.

Another regulatory development under BSEE's watch is the blowout preventer and well-control

requirements. *Id.* at § 250.724.[25] These rules address highly complex offshore drilling operations and reduce technical and operational failures that could have catastrophic results.[26] BSEE recently revised these rules to keep up with industry developments, including real-time well-control monitoring using independent, automatic, and continuous monitoring systems capable of recording and transmitting data from well control systems and blowout preventers.[27]

BSEE also has a number of options when seeking to ensure an operator's compliance with its regulatory programs, including the assessment of civil penalties, as well as referrals for criminal penalties.[28] BSEE may issue Incidents of Non Compliance (INCs) which "underscore the importance of safe operations" and assist BSEE in conducting annual performance reviews of

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[25] *See also* 81 Fed. Reg. 25,888 (April 29, 2016) (codified at 30 C.F.R. § 250, subparts D, G); 83 Fed. Reg. 22,128 (May 11, 2018) (to be codified at 30 C.F.R. § 250, subparts D, E, F, G, Q).

[26] Statement of Brian Salerno, Director of BSEE, before the Committee on Natural Resources Subcommittee on Energy and Mineral Resources, U.S. House of Representatives, March 2, 2016, https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104578.

[27] John M. Cushing, Jr., *The Real Deal on Remote Real-Time Monitoring*, July 29, 2016, https://www.bsee.gov/blog-post/the-real-deal-on-remote-real-time-monitoring.

[28] Although many of BSEE's regulations impact all personnel working aboard MODUs on the OCS, BSEE's authority to assess civil penalties appears limited to operators. *Island Operating Co. v. Jewell*, No. 6:16-cv-00145, 2016 WL 7436665, at *8 (W.D. La. 2016). Likewise, contractors are not subject to criminal liability for their alleged violations of OCSLA. *U.S. v. Moss*, 872 F.3d 304, 304 (5th Cir. 2017).

each operator to addresses safety concerns.[29] In 2019, the maximum civil penalty increased to $43,576 per violation. 30 C.F.R. § 250.1403. BSEE recognizes that "[t]he adjustment of the maximum civil penalty amount is intended to maintain the ***deterrent effect*** of such penalties and promote compliance with the law."[30] Although these fines are directed at the operator, the fines also deter drillers and other service contractors from lapses in safety standards by way of "top down" enforcement. Since BSEE's creation in 2011, offshore injuries and fatalities have shown a general decline.[31]

The USCG also enforces regulations specific to MODU owners and operators. 33 C.F.R. § 140.101 (inspections of MODUs); 46 C.F.R. § 15.520 (MODU crewing requirements). Through formal memorandums of understanding and agreement, BSEE and the USCG have allocated the regulation of MODUs and offshore energy activities.[32] For instance, both BSEE and the USCG have the right to board MODUs for inspections. The USCG inspections address issues related to safe

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[29] U.S. Department of the Interior, Budget Justifications and Performance Information, Fiscal Year 2018, Bureau of Safety and Environmental Enforcement 42, https://www.doi.gov/bpp/budget-justifications (FY 2018 BSEE).

[30] BSEE OCS Civil Penalty Program Policy and Procedures Guidebook, Sept. 2013, at p. 17, https://www.governmentattic.org/22docs/BSEE-OCScivilPenPgmProcedGuidbk_2013.pdf (emphasis added).

[31] BSEE, Offshore Incident Statistics, https://www.bsee.gov/stats-facts/offshore-incident-statistics (last visited Jan. 26, 2019).

[32] BSEE, Interagency Collaboration, https://www.bsee.gov/newsroom/partnerships/interagency (last visited Jan. 24, 2019).

operations of MODUs, credentials of offshore installation managers, and various navigation-related personnel. BSEE and the USCG have entered into various Memoranda of Agreements related to pollution prevention and response, civil penalties, SEMS, and MODUs.

In summary, the offshore seaman and the oil and gas vessel owner are subject to comprehensive regulations to promote safety at sea. Far from ignoring the safety and health of seamen, Congress has acted to create protective measures to deter and punish wrongdoers in the interest of seamen's safety. Allowing punitive damages in a seaman's personal injury suit is not only contrary to Congressional intent and judicial interpretation that the Jones Act and unseaworthiness remedies are compensatory, but it intrudes on another area already occupied by Congress through its creation of federal agencies to constantly deter bad behavior and punish wrongdoers.

B. Contractual Obligations in the Offshore Energy Industry Deter Unsafe Conduct

Offshore drilling contractors and service companies frequently enter into reciprocal contractual defense and indemnity obligations with their oil company customers. These agreements obligate each party to assume liability for injury claims made by the party's own employees.

In the context of offshore drilling operations, the drilling contractor employs most offshore workers on a MODU, whereas the customer, or operator, generally

has far fewer employees on location. When a drilling contractor's employee is injured, it is not uncommon for the employee to file suit against the drilling contractor (maintenance and cure, Jones Act negligence, and unseaworthiness) and the operator (negligence). Even where the operator has allegedly contributed to the employee's injury, most contracts require the drilling contractor to indemnify the operator.[33]

Thus, from a contractual risk allocation perspective, the drilling contractor generally bears greater legal and financial responsibility for injury to its seamen working offshore. These contractual obligations serve to deter a MODU owner from engaging in unsafe conduct that could injure seamen.

In addition, the contractual risk allocation practices that support these vast and expensive drilling projects which benefit society will be made more difficult to plan should the punitive damages allowed by the Ninth Circuit be sanctioned by the Court. While a drilling contract may address defense and indemnity obligations, the marine insurance contracts which provide coverages for these critical obligations, may or

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[33] Michael A. Golemi & William W. Pugh, *Hoping for the Best, Preparing for the Best: "Don't Worry, We Have Indemnity,"* The Advocate, Spring 2017, at 47–49, *available at* https://www.liskow.com/portalresource/HopingfortheBest_PreparingfortheWorst/; *Julia M. Adams & Karen K. Milhollin, Indemnity on the Outer Continental Shelf—A Practical Primer*, 27 Tul. Mar. L.J. 43, 48 (2002).

may not insure the punitive damage obligations of the indemnitee.[34]

C. The Existing Compensatory Scheme Provided to Seamen by the Jones Act and Unseaworthiness Remedies Sufficiently Deters Unsafe Conduct

The compensatory protection afforded seamen is substantial and well-recognized. As Professor Schoenbaum notes:

> [A] seaman who suffers injury or death in the service of a ship has three important remedies against his employer: (1) maintenance and cure; (2) a cause of action for unseaworthiness of the vessel; and (3) a cause of action for negligence under the Jones Act. *All three remedies are unique to seamen; no other worker in our society can invoke such powerful relief in the event of an industrial accident.*

Thomas J. Schoenbaum, *Admiralty and Maritime Law* at 240 (5th ed. West 2012) (emphasis added). IADC members are subject to this variety of specialty seamen's claims further discussed below.

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[34] *Julia M. Adams & Karen K. Milhollin, Indemnity on the Outer Continental Shelf—A Practical Primer*, 27 Tul. Mar. L.J. 43, 101 (2002) ("Quite often, the marine insurance contract will be controlled by law entirely different from the indemnity contract. Therefore, even if the indemnity is valid and enforceable, it may not be covered under the insurance, and therefore be of little practical use to the indemnitee."). For further discussion of the effect on insurance coverage, *see* section II(C), *infra*.

A seaman is entitled to receive maintenance and cure from his employer if he becomes ill or is injured while in the service of the vessel. *See Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730 (1943); *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938). Maintenance and cure is a no fault remedy that provides medical care and living expenses to ill or injured seamen. *Warren v. United States*, 340 U.S. 523, 528 (1951).

A seaman is also entitled to assert Jones Act negligence against his employer. So while the workers' compensation laws of many states bar negligence suits for compensatory damages by an injured employee against his or her employer (*see, e.g.*, Tex. Lab. Code § 408.001(a)), the seaman retains both his workers' compensation-like no fault remedy of maintenance and cure, as well as his right to sue his employer for negligence. In addition, a seaman's standard of causation on this negligence claim is "featherweight." *Miles v. Melrose*, 882 F.2d 976, 984 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). A seaman need only show that his employer's negligence "played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957).

Lastly, a seaman may also maintain a cause of action for breach of the warranty of seaworthiness against the owner of the vessel. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960). The warranty of seaworthiness imposes a nondelegable duty "to furnish a vessel and appurtenances reasonably fit for their intended use." *Id.* at 550. It is absolute, and failure to

supply a safe ship results in liability "irrespective of fault and irrespective of the intervening negligence of crew members." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 25 (1990). No amount of due diligence may serve as a defense to this absolute warranty. *Clevenger v. Star Fish & Oyster Co.*, 325 F.2d 397, 400 (5th Cir. 1963) ("neither ignorance nor due diligence will serve as an adequate defense").

Not only does a seaman have these three distinct causes of action, but he is entitled to pursue these claims in state or federal court. The "saving to suitors" clause in the Judiciary Act of 1789 allows most maritime suits to be filed in state court, even though they are governed by substantive maritime law. Judiciary Act of 1789, 1 Stat. 76, s. 9 (1789).

Courts treat seamen differently in other ways, as well. For instance, a seaman's own contributory negligence will not bar his recovery. *See Boudreaux v. U.S.*, 280 F.3d 461, 466 (5th Cir. 2002); *Miles v. Melrose*, 882 F.2d 976, 984 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

Additionally, seamen's releases are subject to careful scrutiny: "One who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 247–48 (1942) (quoting *Harmon v. United States*, 59 F.2d 372, 373 (5th Cir. 1932)). The shipowner must show that the seaman's release "was executed

freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights." *Id.* at 248.

The Federal Arbitration Act provides further protection to seamen by prohibiting arbitration clauses in seamen's employment contracts. 9 U.S.C. § 2.

Another safeguard afforded seamen is the Seaman's Protection Act. It prohibits employers from retaliating against seamen for engaging in certain protected activities related to compliance with maritime safety laws and regulations. 46 U.S.C. § 2114. Examples include protection from retaliation for reporting the violation of a safety regulation to the USCG and refusing to perform an ordered duty because of apprehension of serious injury. *Id.* at § 2114(a)(1)(A), (B). For such a violation, *Congress has determined*[35] that a seaman may recover compensatory damages, as well as punitive damages not to exceed $250,000. *Id.* at § 2114(b); 49 U.S.C. § 31105(b)(3).

These unique protections afforded to seamen sufficiently deter vessel owners from allowing unsafe practices on their vessels. When all of these exposures are aggregated, it is apparent that no additional protections are needed by way of altering Congress' compensatory framework in order to deter bad behavior. Judicial attempts at altering the compensatory framework of Congress have sometimes been questioned by

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[35] Tellingly, had it so desired, Congress could have afforded seamen punitive damages in personal injury and death claims as well.

commentators and the courts themselves. Professor Robinson has noted: "Since the oil industry went offshore, the legal system has struggled to produce a body of injury law that is rational, fair, internally consistent, and acceptably productive of safety incentives. The result has been chaos."[36]

II. ALLOWING PUNITIVE DAMAGES IN UNSEAWORTHINESS CLAIMS WILL CREATE INDUSTRY-ALTERING IMPACTS

Exposure to punitive damages arising from unseaworthiness claims would create an inordinate burden on members of the IADC.

A. Allowing Punitive Damages Would Create Abuses of the Process

Since this Court sanctioned punitive damages for the arbitrary and capricious denial of maintenance and cure in *Atlantic Sounding Co. v. Townsend*, seamen's lawsuits routinely include such claims. 557 U.S.

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[36] David W. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 973 (1977). *See also McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 353 (1991) (where in discussing conflicting judicial interpretations of who is a "seaman," Justice O'Connor wrote: "our wayward case law has led the lower courts to a 'myriad of standards and lack of uniformity in administering the elements of seaman status.'") (quoting Engerrand & Bale, *Seaman Status Reconsidered*, 24 S. Tex. L.J. 431, 494 (1983)). The Court also cited a Seventh Circuit seaman status case which noted: "We have made a labyrinth and got lost in it. We must find our way out." *Id.* (citing *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1060 (7th Cir. 1984)).

404, 424 (2009). If this Court affirms the Ninth Circuit's decision below, we would expect to see the same effect with regard to pleadings for punitive damages based on unseaworthiness. Predicting a jury's finding as to such damages, however, is nigh impossible:

> The borderline between willful and wanton injury and injury as the result of simple negligence, is often a hairline distinction. The sufferer gains little solace from the doubtful and unpredictable uncertainty of judges and juries as they undertake to place the conduct of the wrongdoer in the categories of willful, intentional, wanton, gross, reckless, or other categories of negligence.

Northwestern Nat. Cas. Co. v. McNulty, 307 F.2d 432, 444 (5th Cir. 1962) (Gewin, J., specially concurring). The Court has recognized the "stark unpredictability" of such awards and noted that "the spread between high and low individual awards is unacceptable." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 494–501 (2008).

Facing the specter of punitive damages judgments, some defendants will feel forced to settle for amounts higher than the estimated range of actual damages suffered by the seaman. Others will resist settlement when faced with a settlement demand so unreasonable that there seems to be no other alternative but trial on the merits. Prolonging litigation does nothing to promote justice.[37] It also does nothing to further the

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[37] Public policy wisely encourages settlements. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994); *see also Airline Stewards and Stewardesses Ass'n v. American Airlines, Inc.*, 573 F.2d 960,

interests of both Congress and the courts to ensure fair compensation for injured seamen.

B. Disparate Treatment of Employers and Vessel Owners

A seaman's liability claims, Jones Act negligence and unseaworthiness, are unique in that they typically arise from the same set of liability facts, yet a seaman may not receive cumulative damages. *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138 (1928) ("[W]hether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong . . . for which he is entitled to but one indemnity by way of compensatory damages."). Should this Court, however, make punitive damages available via one path (unseaworthiness against the vessel owner), but not the other (negligence against the employer), seamen and their attorneys will most certainly proceed more often, and more vigorously, against the vessel owner. The obligation of seaworthiness is peculiarly and exclusively that of the owner or operator. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 100 (1946). In the offshore oil and gas industry, where the seaman's employer is often different

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963 (7th Cir. 1978), cert. denied, 439 U.S. 876 (1979) ("The law generally favors and encourages settlements."). The courts favor settlement as such is indicative that both parties have been satisfied.

than the vessel owner, the vessel owner (typically the drilling contractor) will be disparately impacted.

In addition, IADC members who are Jones Act employers and vessel owners are already further exposed to claims for negligence *per se* and unseaworthiness *per se*. Both Jones Act negligence and unseaworthiness can be the *per se* result of a regulatory violation.[38] Each new regulation promulgated by BSEE adds to the seaman's arsenal to make such claims. Although the defense of comparative negligence is generally available to a vessel owner against a claim of unseaworthiness, that defense disappears if a seaman is injured as a result of a defendant's violation of a safety regulation.[39] IADC members will thus shoulder a disproportionate share of unseaworthiness claims.

C. The Lack of, or Cost of, Available Insurance Coverage for Punitive Damages Is a Significant Burden

Similar to the existence of contractual indemnities in the offshore energy sector, the availability and cost of insurance coverage for seamen's claims is a significant burden on offshore drilling and service companies. Some insurers, although willing to insure a punitive damages award, will charge a hefty price for such

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[38] *Smith v. Trans-World Drilling Co.*, 772 F.2d 157, 160–62 (5th Cir. 1985).

[39] *MacDonald v. Kahikolu Ltd.*, 442 F.3d 1199, 1202 (9th Cir. 2006); *Fuszek v. Royal King Fisheries, Inc.*, 98 F.3d 514, 517 (9th Cir. 1996); *Roy Crook & Sons, Inc. v. Allen*, 778 F.2d 1037, 1041 (5th Cir. 1985).

coverage. State laws, however, impact whether such coverage is even available in certain jurisdictions. *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 335 (1955) (holding that state law, rather that federal admiralty law, should govern marine insurance contracts). Many states, including California where the underlying injury occurred, do not sanction insurance coverage for punitive damages awards.[40] The unavailability of insurance for punitive damages, as well as the inability to benefit from such insurance where it is available, will negatively impact the industry when it comes to long-term planning for potential liabilities.

D. Economic Impacts

The need to protect the safety of seamen is great, but so is the need to protect domestic production of oil. The offshore energy industry is already burdened with the volatility of oil and gas prices due to production abroad. In addition, the cost to comply with the many regulations applicable to oil and gas vessels is great. If workers are allowed to enhance their traditional seamen's remedies with punitive damages, IADC members will be vulnerable to large judgments which could severely impact a company's bottom line. More money will be diverted to protecting the company's legal interests, rather than in funding new projects.

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[40] Wilson Elser, Punitive Damages Review, 2014 ed., https://www.wilsonelser.com/news_and_insights/legal_analysis.

Ultimately, the consumer will be affected at the gas pump.

CONCLUSION

In *The Genesee Chief*, 53 U.S. 433, 459–60 (1851), the Court long ago decided the maritime law was subject to regulation by Congress and its power to change it will "hardly be questioned." Later, as noted by the *McBride* majority, the Court summarized: "[It] must now be accepted as settled doctrine that . . . Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 385 (5th Cir. 2014) (citing *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917)). The Court should decline Respondent's invitation to sail into waters already occupied by Congress. For the reasons stated above, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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No. 18-266

In The
Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE SAILORS' UNION OF THE PACIFIC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Sailors' Union of the Pacific (SUP) was founded in 1891 by Andrew Furuseth, the "Emancipator of Seamen." It is headquartered in San Francisco, California, and maintains branch offices in Wilmington, California; Seattle, Washington; Honolulu, Hawaii; and Norfolk, Virginia. It represents licensed and unlicensed crewmembers serving in the deck, engine, and steward's departments of U.S.-flag merchant vessels.

SUP has been championing the rights and interests of crewmembers for over 125 years. It has an interest in urging this Court to reaffirm the right of its members and other crewmembers to seek all traditional remedies when they are injured, including punitive damages for a vessel owner's willful and wanton breach of the well-established duty to provide a seaworthy vessel.

The courts have long recognized that punitive damages "teach the tort feasor the necessity of reform." *McGuire v. The Golden Gate*, 16 F. Cas. 141, 143 (C.C.N.D. Cal. 1856) (No. 8,815). Unfortunately, that is a lesson that still bears repeating. SUP files this brief in large part because the recent loss of the *S.S. El Faro*[2]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* confirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have granted blanket consent to the filing of *amicus* briefs.

[2] *El Faro* sank with all hands on October 1, 2015, during a routine voyage from Jacksonville, Florida, to San Juan, Puerto

serves as a sobering reminder that the need for such a deterrent is as pressing and enduring as the perils of the sea themselves.

This *amicus* brief seeks to assist the Court in deciding this case by further explaining and documenting three fundamental principles of general maritime law that petitioner and its supporting *amici* seek to avoid.

SUMMARY OF ARGUMENT

Three basic maritime-law principles counsel this Court to confirm the right of an injured crewmember to seek punitive damages in a general-maritime-law unseaworthiness action.

1. Almost two centuries ago, Justice Story declared that "seamen . . . are emphatically the wards of the admiralty." This Court has frequently recognized that principle, sometimes using the language that crewmembers are entitled to "special solicitude." Applying that principle, courts uphold the rights of injured crewmembers unless established law inevitably requires the contrary result. No established law bars

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Rico, when she lost power near the eye of Hurricane Joaquin. Ample evidence suggests that the vessel was unseaworthy as a result of the owner's egregious misconduct. *See generally, e.g.*, TRISTRAM KORTEN, INTO THE STORM: TWO SHIPS, A DEADLY HURRICANE, AND AN EPIC BATTLE FOR SURVIVAL (2018).

respondent's entitlement to seek punitive damages here.

Some lower courts have mistakenly invoked *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), to deny injured crewmembers remedies that are generally available to other maritime litigants. But the "wards of the admiralty" should be the most-favored maritime litigants. At the very least, they should be entitled to pursue the same remedies that are generally available (in appropriate cases) to all other maritime litigants.

2. This Court has frequently recognized that the Jones Act, 46 U.S.C. § 30104, is a remedial statute that was designed to enlarge the protection that the law gives to members of a vessel's crew. It should therefore be construed liberally to accomplish its remedial purpose. If this Court chooses to hold that punitive damages are available in unseaworthiness actions regardless of whether they are available under the Jones Act, it should find (as it did in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009)) that nothing in the Jones Act defeats the long-established right to seek punitive damages. Alternatively, if this Court addresses the availability of punitive damages under the Jones Act, it should construe the statute to preserve all of the common-law remedies (including punitive damages) that were previously available to injured railroad workers or crewmembers.

3. In *The Sea Gull*, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578), Chief Justice Chase explained that "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold

the remedy, when not required to withhold it by established and inflexible rules." That "often-quoted" passage has been recognized as a "principle of maritime law" and "a settled canon of maritime jurisprudence." In *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), the leading opinion used the *Sea Gull* principle to distinguish *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the principal authority on which the *Miles* Court later relied. This Court should apply the principle in similar fashion here to distinguish *Miles* and give respondent the punitive damages remedy that he seeks.

ARGUMENT

Basic principles of maritime law counsel this Court to uphold the rights of an injured crewmember to pursue all traditional remedies, including the right to seek punitive damages when the vessel owner has willfully and wantonly breached its duty under the general maritime law to furnish a seaworthy vessel. Three particularly relevant principles—which this Court has frequently recognized, endorsed, and applied—protect the rights of the members of a vessel's crew when they have been injured as a result of the wrongful acts of their employers and the owners of the vessels on which they serve.

I. The members of a vessel's crew are entitled to "special solicitude" as "wards of the admiralty."

The members of a vessel's crew, such as the members of *amicus curiae* SUP, "'are emphatically the wards of the admiralty' because they 'are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour.'" *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354-55 (1995) (quoting *Harden v. Gordon*, 11 F. Cas. 480, 485, 483 (C.C. Me. 1823) (No. 6,047) (Story, J.)).

Justice Story, on circuit, first articulated the "wards of the admiralty" principle in U.S. maritime law almost two centuries ago. He explained:

> Every court should watch with jealousy an encroachment upon the rights of seamen. . . . But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees. . . . Such, as I understand it, is the general doctrine of admiralty jurisprudence on this subject; and I am very slow to doubt

> either the wisdom or policy, which has breathed so humane a principle into the system.

Harden v. Gordon, 11 F. Cas. at 485. *See also Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 620 (1827) (Johnson, J., concurring) (describing seamen as "emphatically the wards of the Admiralty").

Since Justice Story's classic articulation of the principle, this Court has described the members of a vessel's crew as "wards of the admiralty" (or some variation[3] on that phrase) in at least two dozen opinions. *See* David W. Robertson, *Punitive Damages in U.S. Maritime Law*: Miles, Baker, *and* Townsend, 70 LA. L. REV. 463, 479 n.107 (2010). Most recently, the *Townsend* Court noted that "this Court has consistently recognized that . . . 'seamen . . . are peculiarly the wards of admiralty.'" *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 417 (2009) (quoting *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936)).

In addition, this Court has often expressed the substantive concept embodied in the "wards of the admiralty" principle without using the classic phrase. In *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), for example, the leading opinion explains substantially the same idea:

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[3] In *Vaughan v. Atkinson*, 369 U.S. 527 (1962), for example, this Court explained that "[a]dmiralty courts have been liberal in interpreting th[e] duty [to provide maintenance and cure] 'for the benefit and protection of seamen who are its wards.'" *Id.* at 531-32 (quoting *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525, 529 (1938)).

> Admiralty jurisprudence has always been inspirited with a "special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages."

Id. at 285 (plurality opinion) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970)) (alteration in original). Neither the *Alvez* plurality nor the *Moragne* Court used the word "ward" to describe a member of a vessel's crew, but both invoked the "special solicitude" formulation to convey the same concept—that the courts should diligently protect crewmembers' rights, ruling against them only when established law inevitably requires that result.

Even *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)—the principal authority on which petitioner's entire case rests—recognized "that admiralty courts have always shown a special solicitude for the welfare of seamen and their families." *Id.* at 36. To be sure, the *Miles* Court concluded that the principles favoring "the welfare of seamen and their families" were "insufficient" when the Court created a new right that maritime law had not previously recognized. *See id.* But the *Miles* Court was clear that it refused to provide the requested loss-of-society remedy only because it was bound by established doctrine precluding precisely that remedy in the wrongful-death context. Any attempt to read *Miles* as rejecting the "special solicitude" concept entirely would be "far too broad." *Townsend*, 557 U.S. at 419.

The established doctrine that was relevant in *Miles* precluded a loss-of-society remedy in the wrongful-death context. That doctrine does not apply to punitive damages or in the non-fatal personal-injury context. As a result, the "wards of the admiralty" principle supports respondent's claim to seek punitive damages here—just as that principle supported the *Townsend* Court's conclusion that the Jones Act does not bar a claim for punitive damages for the willful and wanton disregard of the maintenance-and-cure obligation. *See Townsend*, 557 U.S. at 417.

A number of lower courts (and a number of maritime employers or vessel owners that have been guilty of egregious misconduct) have mistakenly tried to "give greater pre-emptive effect to the [Jones] Act than is required by its text, *Miles*, or any of this Court's other decisions interpreting the statute." *Townsend*, 557 U.S. at 424-25. The result has often meant that the "wards of the admiralty" are denied a remedy that is available to other maritime plaintiffs. In *Powers v. Bayliner Marine Corp.*, 855 F. Supp. 199 (W.D. Mich. 1994), *aff'd on other grounds*, 83 F.3d 789 (6th Cir. 1996), for example, the court held that the personal representatives of passengers who died in a recreational-boating accident could seek non-pecuniary loss-of-society damages in their maritime action against the sailboat manufacturer. The district court recognized that *Miles* denied loss-of-society damages to seamen in unseaworthiness actions, but reasoned that *Miles* was "inapposite" because "none of the plaintiffs is a seaman or personal

representative of a seaman." *Id.* at 201.[4] That is without doubt not the kind of "special solicitude" that this Court intended in its frequent invocations of the principle. The wards of the admiralty should be the most-favored maritime litigants, not denied remedies on account of their status. At the very least, they should be entitled to pursue the same remedies that are generally available (in appropriate cases) to all other maritime litigants—and, indeed, available (in appropriate cases) to all other litigants under the common law. They should have access to the punitive-damages remedy that is generally available to other litigants.

II. Because the Jones Act is a remedial statute, this Court should construe it to accomplish Congress's remedial purpose.

This Court has frequently recognized that the Jones Act, 46 U.S.C. § 30104, is a remedial statute, intended to expand the remedies available to members of the crew of a vessel who are injured in the course of their employment. Most recently, the *Townsend* Court noted that "this Court has consistently recognized that the [Jones] Act 'was remedial, for the benefit and protection of seamen who are peculiarly the wards of

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[4] The district court in *Powers* was also bound by circuit precedent extending *Miles* to punitive damages. *See Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir. 1993). The *Powers* court used similar reasoning to distinguish *Miller*, holding that the personal representatives of passengers could seek a remedy that the court could not have granted to seamen. *See Powers*, 855 F. Supp. at 202-03.

admiralty.'" 557 U.S. at 417 (quoting *The Arizona*, 298 U.S. at 123); *see also, e.g.*, *Chandris*, 515 U.S. at 358 (construing the statute to "further[] the Jones Act's remedial goals"); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 349 (1991) ("the Jones Act is a remedial statute"); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 430 (1939) (describing the Jones Act as "remedial legislation for the benefit and protection of seamen" that "has been liberally construed to attain that end").

This Court in *The Arizona* clearly described the implications of this second principle in a passage that the *Townsend* Court subsequently quoted (in part):

> The [Jones Act] was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. Its provisions . . . are to be liberally construed to attain that end. . . .

298 U.S. at 123 (citations omitted).

The principle that the Jones Act must be liberally construed to attain its remedial purpose is relevant in either of two distinct ways in this case. This Court may resolve the current case in substantially the same way that it resolved *Townsend*, holding that punitive damages are available in an unseaworthiness action (just as they are available in an action for the willful and wanton disregard of the maintenance-and-cure obligation) regardless of whether they are available under the Jones Act. *See* Pet. Br. 16-32. In that event, this

Court should invoke the remedial-statute principle to support the conclusion that nothing in the Jones Act deprives injured crewmembers of the remedies that were generally available prior to the Jones Act (just as it supported the same conclusion in *Townsend*, 557 U.S. at 417).

Alternatively, this Court may resolve the current case by ruling that punitive damages are available under the Jones Act, and thus no basis exists for barring punitive damages in an unseaworthiness action. *See* Pet. Br. 32-42; Injured Crewmembers Amicus Br. 4-31. In that event, this Court should invoke the remedial-statute provision to support the conclusion that all of the remedies available at common law to injured railway workers or injured crewmembers continue to be available under the Jones Act (because the purpose of the statute was "to enlarge th[e] protection [of seamen], not to narrow it," *The Arizona*, 298 U.S. at 123).

III. This Court should follow the well-established preference in maritime law to grant a remedy to an injured claimant when no established and inflexible rule denies the remedy.

Chief Justice Chase, on circuit, articulated the third particularly relevant principle for this case over a century and a half ago in *The Sea Gull*, 21 F. Cas. 909 (C.C.D. Md. 1865) (No. 12,578):

> [I]t better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not

> required to withhold it by established and inflexible rules.

21 F. Cas. at 910. The actual holding in *The Sea Gull*—permitting a wrongful-death action under the general maritime law—was temporarily overruled by *The Harrisburg*, 119 U.S. 199 (1886), which was itself overruled by *Moragne* in 1970. But courts have frequently invoked the broader principle favoring the granting of a remedy to an injured claimant when no established and inflexible rule denies the remedy. This Court quoted the relevant passage in both *The Harrisburg*, 119 U.S. at 206-07, and *Moragne*, 398 U.S. at 387. Quoting the relevant passage in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), this Court described it as a "principle of maritime law." *Id.* at 583. *See also, e.g.*, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 213 (1996) (quoting *Moragne*, 398 U.S. at 387, which in turn quoted *The Sea Gull*, 21 F. Cas. at 910); *Miles*, 498 U.S. at 36 (same).[5]

In *Alvez*, the leading opinion described Chief Justice Chase's principle as "a settled canon of maritime jurisprudence."[6] 446 U.S. at 281 (quoting *Moragne*, 398

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[5] The *Miles* Court found the *Sea Gull* principle "insufficient." An "established and inflexible rule" precluded the requested remedy. *See* 498 U.S. at 36. But the *Miles* Court did not question the principle itself; on the contrary, it quoted the *Moragne* Court's quotation of Chief Justice Chase with approval. *Id.* Any attempt to read *Miles* as rejecting the *Sea Gull* principle would be "far too broad." *Townsend*, 557 U.S. at 419.

[6] Justice Powell did not join *Alvez*'s four-justice plurality opinion because he adhered to his view that *Gaudet*, on which the plurality relied, "was decided wrongly." He nevertheless concurred

U.S. at 387, which in turn quoted *The Sea Gull*, 21 F. Cas. at 910). Moreover, it applied that "settled canon of maritime jurisprudence" to distinguish *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the principal authority on which the *Miles* Court later relied. The issue in *Alvez* was "whether general maritime law authorizes the wife of a harbor worker injured nonfatally aboard a vessel in state territorial waters to maintain an action for damages for the loss of her husband's society." *Alvez*, 446 U.S. at 276. The defendant argued that the claimed damages were unavailable because "no right to recover for loss of society due to maritime injury has been recognized by Congress under § 2 of the Death on the High Seas Act (DOHSA) [now codified at 46 U.S.C. § 30303]; see *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 620 (1978), or the Jones Act [now codified at 46 U.S.C. § 30104]." *Alvez*, 446 U.S. at 281. This Court rejected that argument. Applying the

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in the *Alvez* judgment because he "recognize[d] the utility of *stare decisis* in cases of this kind." 446 U.S. at 286 (Powell, J., concurring in the judgment). In any event, Justice Powell clearly supported the *Sea Gull* principle. *See, e.g.*, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 234 (1986) (Powell, J., concurring in part and dissenting in part) (quoting Chief Justice Chase's "often-quoted passage" with approval). And the *Alvez* dissenters did not disagree with the *Sea Gull* principle. They dissented because they thought that the state-court judgment below was not final, and accordingly felt that this Court lacked jurisdiction under 28 U.S.C. § 1257. *See* 446 U.S. at 286-90 (Marshall, J., dissenting). Justice Marshall clearly supported the *Sea Gull* principle. *See, e.g.*, *Higginbotham*, 436 U.S. at 629-30 (Marshall, J., dissenting) (quoting and following the *Sea Gull* principle).

Sea Gull "canon of maritime jurisprudence," the leading opinion explained:

> Plainly, neither statute embodies an "established and inflexible" rule here foreclosing recognition of a claim for loss of society by judicially crafted general maritime law.
>
> DOHSA comprehends relief for *fatal* injuries incurred on the *high seas*. . . . *Higginbotham* never intimated that the preclusive effect of DOHSA extends beyond the statute's ambit. . . .
>
> Nor do we read the Jones Act as sweeping aside general maritime law remedies.

Id. at 282. This Court should now apply the *Sea Gull* principle in similar fashion to distinguish *Miles* and give respondent the remedy that he seeks. Not only do *Townsend* and this Court's other precedents command that result, but affirming the judgment below "better becomes the humane and liberal character of proceedings in admiralty."

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

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February 28, 2019

No. 18-266

In the
Supreme Court of the United States

THE DUTRA GROUP,
Petitioner,

v.

CHRISTOPHER BATTERTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* WATERWAYS COUNCIL, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Waterways Council, Inc. (WCI), located in Washington, D.C., is the public policy organization advocating for a modern, efficient, and well-maintained national system of ports and waterways. WCI is made up of nearly 200 members, including most tug and barge companies operating on the inland river system, companies that ship or use goods transported on our inland waterways, ports, agricultural groups, Chambers of Commerce, environmental and conservation entities, lock and dam builders, and other waterways advocacy groups. As these members well know, the inland waterways are a key component of America's competitiveness in the global marketplace.

WCI's members thus have a keen and sustained interest in keeping the country's waterborne commerce competitive and efficient. The seamen assigned as members of the crew of vessels on these waterways benefit from a compensation system that is both fair and generous. Adding a layer of uncertain non-economic/non-pecuniary damages, not tied to actual losses, to the already-existing system created by Congress in 1920, as the Ninth Circuit proposes, poses an unreasonable economic risk. WCI sees this case as having vital and exceptional importance to the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties consented to the filing of this brief.

inland marine transportation segment of our economy, a segment relied upon by family farmers, manufacturers, energy producers, lock and dam constructors, and commodity shippers. WCI urges this Court to reverse the judgment of the Ninth Circuit and adopt the reasoning of the majority opinions in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) (*en banc*).

SUMMARY OF THE ARGUMENT

The inland marine transportation industry carries goods on the waterways not only more inexpensively but also more fuel efficiently, less polluting, and more safely than transportation of similar quantities of goods on our nation's highways and railways. Already vessel crewmembers are protected by a compensation system with benefits and causes of action more generous than granted to truck companies' employees (workers' compensation) or rail crewmembers (FELA). Supplementing further the remedies already afforded to injured seamen and their families will increase the costs, and thereby decrease the competitiveness, of the marine transportation industry as compared to trucking and rail transportation. Adding costs to the industry via punitive exposure will not just harm the Jones Act seamen's employers but also the shippers, all those who rely on this critical sector, and ultimately damage the nation's economy and make it less competitive. Moreover, given the United States Coast Guard's comprehensive regulation of the seaworthiness of WCI members' vessels, no such incentivization is needed. Punitive damages would increase costs with no benefit to the country's economy and no gain in personal safety.

Not only is the current compensatory compensation system important to sustaining this industry's competitiveness, it makes little sense to graft a non-pecuniary damage award possibility onto the General Maritime Law unseaworthiness cause of action afforded a seaman. A punitive damages claim necessarily must assert egregiously-unreasonable

conduct by the Jones Act employer – yet the unseaworthiness doctrine is a strict liability cause of action not requiring lack of reasonable care. The strict liability cause of action will transform into a heightened negligence claim and thus push aside the Congressionally-mandated compensatory regime now available to seamen.

ARGUMENT

I. Allowance of Punitive Damages for Unseaworthiness Claims Would Cause Economic Harm and Comparative Disadvantage to the Inland Marine Transportation Industry.

A. The Inland Waterways Are of Vital Economic Importance to the United States.

The tugs and barges crewed by Jones Act seamen on the inland waterway system provide the most fuel efficient, environmentally sound, safe, and economical way to ship America's bulk commodities. In 2016, 557.8 million tons valued at $300 billion were transported on the nearly 12,000 miles of navigable inland rivers. These "inland marine highways" move commerce to and from 38 states throughout the heartland and Pacific Northwest. The inland waterways industry sustains more than 541,000 jobs. To emphasize just one aspect of this waterway system, American farmers depend on the inland rivers and ports to get their crops to global markets easily and inexpensively, compared to agricultural interests in other regions of the world where such an incredible inland transportation system simply does not exist.

And the crewmembers assigned to these vessels assist in creating an inland marine industry that outperforms the other carriers of such bulk goods – rail and truck. The Texas A&M Transportation Institute in January 2017 updated a study that demonstrates the following key statistics:

1. Emissions including greenhouse gases generated by inland towing constituted a fraction of that produced by trucks on a gram-per-ton-mile basis and considerably lower than rail.[2]

2. The inland towing segment, compared to rail and truck, is far more fuel efficient in ton-miles per gallon as this graphic shows.[3]

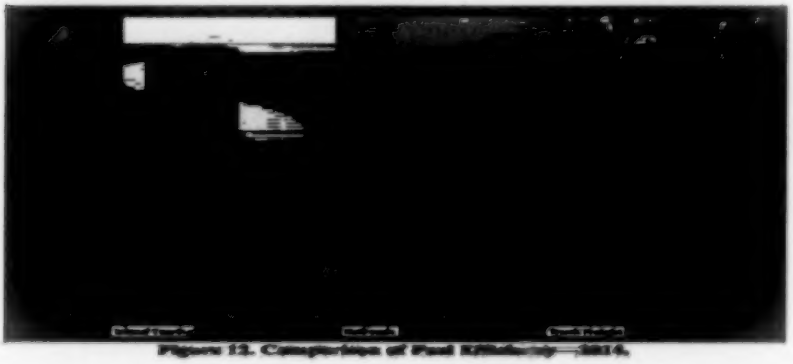

Figure 12. Comparison of Fuel Efficiency—2014.

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[2] *A Modal Comparison of Domestic Freight Transportation Effects on the General Public: 2001-2014*, Center for Ports and Waterways, Texas A&M Transportation Institute (January 2017), www.nationalwaterwaysfoundation.org/documents/Final%20TTI%20Report%202001-2014%20Approved.pdf (last visited January 28, 2019). The study analyzed the societal impacts of a diversion of waterborne cargo to truck or rail modes in the event of a major waterway closure.

[3] *Id.* at 47.

3. Critically, on the issue of safety of the inland marine industry, the below graphic shows the tremendous difference in the ratio of injuries per million-ton-miles among the three bulk commodity transportation modes.[4]

Figure 14. Ratio of Injuries per Million Ton-Miles versus Inland Marine—2011–2014.

As safe as the inland maritime industry has been, recently additional safeguards have been implemented via an important rulemaking by the United States Coast Guard. 46 C.F.R. Subchapter M, effective in June 2016, puts into place a comprehensive inspection program and minimum safety standards for towing vessels to ensure regulatory oversight of each towing vessel's seaworthiness. Subchapter M extensively prescribes equipment condition requirements, robust safety management systems, and third-party audits to address seaworthiness issues. In addition, many shippers themselves impose stringent regimes to ensure seaworthy vessels before they will use a carrier's equipment to transport their products. Adding punitive damage exposure is not needed to enhance safety. Instead, costs will rise, farmers in the

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[4] *Id.* at 51.

nation's heartland (among other shippers) will become less competitive in the global marketplace, with no benefit to anyone except plaintiffs and their lawyers.

The inland marine transportation industry shines in all these key areas – particularly in safety – as compared to truck and rail. Imposition now of the overhanging risk of windfall recoveries for Jones Act seamen assigned to these vessels threatens this vital economic driver. Punitives will undermine the competitiveness of the inland maritime industry, hurt shippers, and damage the country's economy.

B. The Safer, More Fuel Efficient, and Environmentally-Sound Inland Maritime Industry Should Not Be Comparatively Disadvantaged With Punitive Damages.

Yet punitive damages, if added to the remedies afforded seamen, would undoubtedly increase costs to this segment and work a comparative disadvantage. Business will be driven from the maritime sector to truck and rail, to the disadvantage of the country. The compensation scheme for injured railroad workers, the Federal Employers' Liability Act (FELA), while allowing tort-based negligence actions, is limited to pecuniary-only damages. *See Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59 (1913). Truckers injured in the course of their work, of course, have no federal compensation system but rather have recourse to workers' compensation statutes of the many states. These employers are not at risk for punitive damages. A new-found recognition of punitive damages confined to marine transportation will diminish the economic and social benefits already gained through this mode of bulk goods transport.

C. The Seaman's Remedies Are Already Generous.

A seaman's lawyer knows that proving the client's status as a Jones Act member of the vessel's crew is "the brass ring" and worth pushing the limits or outer edges of seaman status – as this Court's Jones Act jurisprudence proves. *See, e.g.*, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991) ("We think the time has come to jettison the aid in navigation language" to define seaman status); *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005) (nearly stationary dredge a "vessel" for Jones Act and Longshore Act purposes).

Moreover, seaman status – even in the absence of a shot at punitive damages – is considered highly favorable given the substantive and procedural advantages granted to seamen's litigation claims against employers:

1. The unseaworthiness warranty owed the seaman imposes an "absolute duty" on the shipowner to provide a "reasonably fit" vessel that is not dependent on the proof of negligence or fault. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). This duty is one of strict liability for a defective condition on the ship or with the ship's equipment. *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6.26 (6th ed. 2018).

2. The seaman's proof of causation does not need to rise to the level of "proximately causing" the injury; instead, any negligence that played a role in the injury, no matter how slight, will suffice. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685 (2011).

3. The seaman possesses procedural advantages of choice of forum (state or federal court) and whether

to try the case to the bench or to a jury. *See* 28 U.S.C. § 1333 (2006); Fed. R. Civ. P. 9(h).

The seaman's already-ample legal armamentarium needs no further enhancement to ensure full compensation to the victim of an unfortunate marine accident. The seaman possesses remedies and procedural advantages not available to his or her colleagues in other transportation modes. And, as will be discussed more fully below and in the Petitioner's brief, accepting the Ninth Circuit's reasoning will thwart the express intent of Congress when it legislatively overruled this Court in *The Osceola* and thus permitted a seaman to recover for negligence. "Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990).

II. Allowance of Punitive Damages for Unseaworthiness Claims Would Violate *Miles* and Render the Jones Act a Dead Letter.

This Court in *Atlantic Sounding Co. v. Townsend* could not have been clearer: "[t]he reasoning of *Miles* remains sound." 557 U.S. 404, 420 (2009). In *Miles*, the Court, inter alia, refused to bypass Congress' clear intent in passing the Jones Act by "sanction[ing] more expansive remedies in [an unseaworthiness action] than Congress had allowed in [a Jones Act action]." 498 U.S. at 32–33. *Miles* has been the subject of rigorous judicial and academic debate, but, if nothing else, it teaches that the Jones Act, as part of Congress'

"uniform plan [for] maritime tort law," should not play second fiddle to the General Maritime Law. *Id.* at 37.

If this Court accepts the Ninth Circuit's reasoning, however, the Jones Act would be relegated to just that. Unseaworthiness would be the star, and the Jones Act would be an after-thought, shoved into pleadings solely to retain the unique procedural advantages afforded by the Act. *See* 28 U.S.C. § 1333; Fed. R. Civ. P. 9(h). Congress surely did not intend that result—it intended that seamen use the Jones Act, not unseaworthiness, "to recover for negligence . . . ." Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 328–29 (2d ed. 1975).

A. Punitive Damages Are Not Available Under the Jones Act.

As Petitioner notes, there has been universal consent among the courts, including this Court, regarding the availability of punitive damages under the FELA. *See* Pet'r's Br. 17–18. They are not available. *See Seaboard Air Line Ry. v. Koennecke*, 239 U.S. 352 (1915); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993); *Kozar v. Chesapeake & Ohio Ry.*, 449 F.2d 1238 (6th Cir. 1971); *Wildman v. Burlington N. R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987).

Because punitive damages are not, and never have been, available under the FELA, and because the Jones Act imported into maritime law the same remedies available to railroad workers under the FELA,[5] it necessarily follows that punitive damages are similarly unavailable under the Jones Act.

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[5] *Miles*, 498 U.S. at 32.

Unsurprisingly, the lower federal courts unanimously agree. *See Miller*, 989 F.2d at 1457; *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560–61 (9th Cir. 1984); *McBride*, 768 F.3d at 390–91; *see also Townsend*, 557 U.S. at 428 (Alito, J., dissenting).

B. Allowing Punitive Damages for Unseaworthiness Would Eclipse the Congressionally-Enacted Seaman's Compensation Remedies.

As a real-world litigation strategy, Jones Act negligence claims and general maritime law unseaworthiness claims travel together. *See* Gilmore & Black, *supra*, at 389–90 (explaining that the "current practice" in seaman tort suits is to plead both Jones Act negligence and General Maritime Law unseaworthiness). Where one goes, the other is not far behind—the reason being that "they derive from the same accident and look toward the same recovery."[6] *See id.* at 383; *see also McBride*, 768 F.3d at 400 (Clement, J., concurring) ("[U]nseaworthiness has been transformed into a strict liability action, and then systematically expanded in scope so that it would now award an unseaworthiness recovery to an injured seaman who would have traditionally only had a Jones Act negligence action"). A claim for withheld maintenance and cure may arise out of the same accident, but that claim is completely separate from

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[6] As this Court explained in *Pacific S.S. Co. v. Peterson*, "whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong." 278 U.S. 130, 138 (1928).

any fault connected to the underlying accident. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Comm. 73, 147–48 (1997) (explaining that while unseaworthiness and Jones Act negligence are "Siamese Twins," the "action for damages for withholding maintenance and cure is completely separate and independent from [those] claims").

Should punitive damages now be grafted onto the unseaworthiness cause of action but not Jones Act negligence, the Jones Act will shortly be pushed aside. Although unseaworthiness at present need no showing of the shipowner's negligence or that of the seaman's fellow crewmembers, the two causes of action arise from the same conduct. *See Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 729 (1967) (White, J., dissenting) (citations omitted) ("While it is true that unseaworthiness is legally independent of negligence, it cannot be denied that in many cases unseaworthiness and negligence overlap.").

Of course, to recover punitive damages, a party must show a level of mental culpability. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 9–10 (5th ed. 1984) (explaining that a grossly heightened sense of negligence may give rise to punitive damages). As Justice Thomas phrased it in *Townsend*, punitive or exemplary damages arise from "tortious acts of a particularly egregious nature." *Townsend*, 557 U.S. at 411. With accidents involving negligent conduct, the seaman's lawyer will be incentivized to focus exclusively on unseaworthiness.

Instead of pursuing the Jones Act claim, the savvy seaman's lawyer will transmogrify that negligent, tortious conduct into "unseaworthiness" to plausibly allege a claim for punitive damages. *See An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 Harv. L. Rev. 1900, 1909–10 (1992) (explaining that plaintiffs' lawyers have a natural tendency to exploit punitive damages). In such a world, there is no room left for the Jones Act.

Making a dead letter of the Jones Act negligence cause of action circumvents Congress' plan for seamen's tort recovery against their employers. It dislodges that conduct-based reasonable due care standard and shoehorns it into the unseaworthiness cause of action that heretofore existed to allow recovery for an unfit ship or equipment regardless of fault or negligence. The Ninth Circuit's approach contradicts the Jones Act and improperly alters the seaman's unseaworthiness claim.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Ninth Circuit.

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